June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to offer my enthusiastic recommendation on behalf of DanLan Luo's (Columbia '24) application to serve as a judicial law clerk in your Chambers. I have had the privilege to work closely with DanLan over the past year and a half, having served as DanLan's Constitutional Law instructor and then hired her as a research assistant. Through these interactions, I have been impressed by DanLan's analytical, writing, and legal research skills, as well as her professionalism and intellectual curiosity. An editor on the Columbia Journal of Environmental Law who was selected as a judicial extern for the highly competitive Second Circuit Judicial Externship program here at Columbia Law School, DanLan possesses all the qualities that would make her an excellent clerk.

DanLan's legal skills and intellectual curiosity were on full display during her time as a student in my Constitutional Law class. Throughout the semester, DanLan was an engaged and active participant in class, whose answers to my cold-call questions consistently elevated the conversation. As a student who aspires to a career in public interest law, DanLan would frequently remain after class to continue conversations. These conversations ranged from the substantive questions of the scope of presidential power in emergencies involving foreign relations to the merits of the 1L curriculum. This authentic engagement with the course material and dedicated preparation paid off in her excellent final exam. Writing in clear and concise prose, DanLan readily identified issues of law that other students missed. Drawing on a nuanced reading of the relevant precedents, DanLan analyzed these issues with a keen eye for detail and a mastery of the applicable law. Her analysis of whether a homeowners' association should be subject to the First Amendment was especially strong, as DanLan deftly considered the arguments that parties would be likely to bring, noting how the parties would be likely to formulate the holdings of the relevant precedents, before offering her own conclusion as to whose arguments ought to prevail.

Based on this exemplary performance in class, I was delighted when DanLan agreed to serve as a summer research assistant. Over the course of the summer, I was continually impressed by DanLan's research skills. DanLan is a meticulous and organized researcher. Her assignment was to compile a database of the authorities that Dobbs relied on, and compare the Court's treatment of these authorities with a full reading of the cases themselves. Working in-dependently and efficiently, DanLan assembled a comprehensive list of all the precedents. She then compared how the Court treated the precedent with the actual text of the decision. In doing so, DanLan revealed a close eye for detail, noting the differences between how the Court presented the precedent and what the full opinion represented. DanLan supplemented this case research with a survey of recent scholarship on Dobbs, which she succinctly summarized in an illuminating memo.

Throughout, it has been a joy to work with DanLan. An efficient researcher who works well in teams and independently, DanLan is a sharp thinker who is also able to think on her feet, deftly fielding my cold call questions in class with ease and confidence. In short: I have no doubt DanLan would be a phenomenal law clerk. If I can be of any further assistance in your review of DanLan's application, please feel free to contact me at (202) 386-2097.

With best regards,

Maeve Glass

Maeve Glass - maeve.glass@law.columbia.edu - _212_ 854-0073

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Danni Luo for a clerkship in your chambers. This past year Danni was one of the better students in my Legislation and Regulation course. She came often to office hours and was particularly interested in administrative law issues. Danni scored well on the exam (39 out of 107), which was difficult. Notably, she spotted every issue that I included in my grading rubric (there were eight), reflecting a careful and thorough approach. Had she examined these issues in greater depth, she would have made an A in the course.

Danni also stood out among my students for her authenticity, genuine yearning to learn and give back, and desire to pursue a career in public service. Danni is particularly interested in health justice and queer rights. She has seen firsthand the challenges facing households with limited access to healthcare and the role that healthcare access plays in facilitating economic opportunity and political equality. Danni hopes to be able to use her skills as an attorney to improve medical services for underserved communities, particularly queer communities and trans youth.

I should also add that Danni is a delightful person—humble, upbeat, and engaged. She would bring great energy to any chamber that was lucky enough to have her. Please let me know if you have any questions.

Warm Regards,

Lev Menand

Lev Menand - lmenand@law.columbia.edu - (212) 854-0674

DANLAN (DANNI) LUO
Columbia Law School J.D. '24
440-371-8064
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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt from the appellate brief I completed as part of the Environmental Law Moot Court, a specialized 1L legal writing and oral advocacy program at Columbia Law School. The appeal is submitted to the fictitious Twelfth Circuit, which has no caselaw of its own. The class ended in April, 2022. Consequently, I did not have access to more recent decisions like *West Virginia v. EPA*, *Sackett v. EPA*, and the currently pending *Loper Bright Enterprises. v. Gina Raimondo*. I edited the brief based on comments from my instructor and teaching assistants. I have omitted the table of authorities, statement of facts, summary of argument, and sections I, II, III(B), and IV of the brief. I did not write sections I–II. Sections III(B) and IV have been omitted due to length. I will provide the full brief upon request.

The competition centered around a state named New Union. New Union has an extremely polluted lake named Lake Chesaplain. Lake Chesplain was a prime tourist attraction and served as a major source of New Union's drinking water, but it has been in decline for decades. Much of the lake is matted with algae, and the runoff from several hog concentrated animal feeding operations (CAFOs) create foul odors around the area. To address the situation, EPA adopted a total maximum daily load (TMDL) restricting the amount of phosphorus discharge into the lake. This is the center of the dispute. Clean Water Act, 33 U.S.C. § 1313(d)(1)(C) exclusively employs the term "total maximum ***daily*** load." However, EPA adopted an annual metric. My client, the Chesaplain Lake Watch (CLW), is a community-minded local nonprofit. CLW commenced suit in federal district court, challenging that EPA violated § 1313(d)(1)(C) of the CWA. The district court found that (1) EPA is not entitled to *Chevron* deference and (2) the TMDL violated the plain language of § 1313(d)(1)(C). EPA appealed this decision.

III. EPA'S ADOPTION OF A TOTAL MAXIMUM ANNUAL LOAD RATHER THAN A TOTAL MAXIMUM DAILY LOAD VIOLATED THE CWA § 303(D) REQUIREMENTS FOR A VALID TMDL.

Lake Chesaplain's Total Maximum Daily Load (TMDL) violated the Clean Water Act (CWA). CWA § 303(d) requires a TMDL to be expressed in daily terms. EPA's actions contravened the plain meaning of the CWA § 303(d). Further, EPA's actions are unreasonable and therefore, should receive no judicial deference. Plaintiff-Appellant-Cross-Appellee, Chesaplain Lake Watch (CLW), asks the panel to uphold the trial court's grant of summary judgment, which held that EPA's TMDL does not receive judicial deference and that EPA violated the CWA.

Courts follow a two-step inquiry to determine whether an agency's interpretation of a statute it administers ought to receive judicial deference. *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions."). First, the court inquires "whether Congress has directly spoken to the precise question at issue." *Id.* If the Congressional intent is unambiguous, the inquiry ends at this first step. Courts must effectuate clear Congressional intent. *Id.* at 842–43. Where a statute is silent or ambiguous on a particular matter, the court asks a second question: was the agency's interpretation based on a permissible construction of the statute? *Id.* at 843. "Considerable weight" or "deference" is given to the executive department's statutory constructions.

Here, a federal agency is employing an expansive interpretation of the word "daily" in the term "total maximum daily load." R. at 13. Namely, a federal agency is interpreting an existing U.S. statute. Accordingly, *Chevron* is the applicable framework, and the court should affirm the district court decision that EPA's TMDL receives no *Chevron* deference and is otherwise invalid. R. at 14.

A. TMDLs must be expressed in daily terms.

1. EPA Must Evaluate Phosphorus Emissions On A Daily, Not Annual Basis Because the Statutory Language is Unambiguous.

The language of the Clean Water Act is unambiguous because daily is not a flexible term. An annual TMDL is therefore untenable. Assuming that Congress has spoken directly on the issue in contention, courts and agencies must follow the clearly expressed Congressional intent. *Chevron*, 467 U.S. at 842–843. Here, the Clean Water Act, 33 U.S.C. § 1313(d)(1)(C) states that "[e]ach State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load." Congress has spoken on the specific issue. Furthermore, Congress's mode of expression leaves no room for ambiguity. The Webster-Merriam dictionary defines daily as "(1) occurring, made, or acted upon every day; (2) reckoned by the day. *Daily*, Merriam-Webster Dictionary (11th, ed. 2003). The typical person, in using daily, would not mean anything other than specifying that the referenced event or unit is measured per day. Therefore, the literal meaning and common use of the word daily both indicate that a total maximum daily load must, by definition, be defined on a day-by-day basis.

As the statute is unambiguous about the meaning of daily within the term TMDL, the analysis should stop at the first step of the *Chevron* doctrine. Therefore, EPA's interpretation should receive no deference. As the D.C. Circuit concluded, "daily means daily." *Friends of the Earth v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006). There, the court ruled on the same provision of the Clean Water Act. EPA approved two TMDLs for the Anacostia River, which was one of the ten most polluted rivers in the country. An annual TMDL governed the discharge of oxygen-depleting pollutants. The seasonal TMDL limited pollutants that contributed to turbidity. *Id.* at 143. The court addressed the question of whether the term "daily" is "sufficiently pliant to mean

a measure of time other than daily." *Id.* at 142. EPA contended that the Congressional mandate of a total maximum ***daily*** load could be read to be an ***annual*** or ***seasonal*** maximum daily load. *Id.* at 143. EPA argued that the CWA TMDLs must be set to meet applicable Water Quality Standards. EPA alleged that the oxygen-demanding pollutants at issue were unsuited to daily regulation. *Id.* at 143–44. The court ruled that EPA's reasonable justification for deviating from the statutory language was insufficient to find for EPA. This is because judges cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Id.* at 145. Even if TMDLs are ill-suited for certain pollutants, the court noted that EPA must address its concerns to Congress rather than the judiciary. *Id.* at 145.

There is further support for the thesis that daily means daily. The canon against surplusage also demands that daily be read as a fixed metric and not as an elastic term. When applicable, the surplusage canon demands that courts read statutes in such a way that the words are all given effect. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Although the surplusage canon is not absolute, treating "daily" as an integral part of "total maximum daily load" "gives effect to every clause and word of a statute," and so would present a strong indication that the surplusage canon should be applied. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). § 1313(d)(1)(C) reads:

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section [304(a)(2)] of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C). Under Defendants' argument, the word daily would be rendered extraneous. The only part of CWA § 303(d) that would be given effect would be the seasonal variability language. In contrast, following the text of the statute preserves both Congress's intended unit of measurement and seasonal considerations.

While the Second Circuit has concluded that TMDLs do not need to impose daily limits, the court should decline to follow its reasoning. The Second Circuit split with *Friends of the Earth* by maintaining that daily can represent a margin of flexibility, as some pollutants are best measured in terms other than daily. *Nat. Res. Def. Council v. Muszynski*, 368 F.3d. 91, 98 (2d Cir. 2001) (reasoning that TMDLs "may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies"). This decision is not binding on the Twelfth Circuit. Moreover, *Muszynski* signals that the Second Circuit would find the Lake Chesplain TMDL problematic. *Muszynski* is a case about New York City's phosphorus TMDLs. *Id.* at 94. It concludes with a remand "for EPA to justify how the annual period of measurement takes seasonal variations into account." *Id.* at 99. The court sought an explanation for "how expressing New York TMDLs in terms of annual loads will account for seasonal fluctuations in the levels of phosphorus in waterbodies." *Id.* at 103. This suggests that the Second Circuit would be hesitant to defer to an annual TMDL without a factual finding by EPA that an annual metric was sensitive enough to seasonal fluctuations to meet the stipulations of the CWA. Here, the record reflects that EPA offered no such explanation for Lake Chesaplain's annual TMDL.

Additionally, although the pollutant at issue here is also phosphorous, the unique conditions surrounding Lake Chesaplain distinguish the present case from *Muszynski*. Unlike the waterbody at issue in *Muszynski*, Lake Chesaplain has been the recipient of phosphorus run-off

since the home construction boom of the 1990s. The factual record of *Muszynski* clarifies that the eutrophication of the upstate water reservoirs had only been a problem "in recent years." *Muszynski*, 368 F.3d. at 94. In contrast, the record reflects that not only has the eutrophication process in Lake Chesaplain taken place over several decades, the dissolved oxygen level of the lake was almost half of that of a healthy ecosystem. In other parts of the lake, the phosphorus level was almost triple that of a healthy freshwater lake. R. at 7–8. Subsequently, it would be difficult to argue that the reduction in run-off needed for Lake Chesaplain to meet CWA requirements is not drastic. Thus, the dire condition of the lake may require an understanding of "daily" that is closer to the plain language requirement of the CWA because a more stringent TMDL is necessary to meet the requirements of the CWA.

2. Even if the language of the statute is ambiguous, EPA's decision to use an annual TMDL for Lake Chesaplain should not receive deference because it is not a permissible interpretation of the statutory language.

EPA's adoption of an annual TMDL should not receive judicial deference because it is unreasonable. In the case of an explicit ambiguity in the statute, the agency interpretation of the statute is entitled to deference unless it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844. Put differently, agency interpretations of statutory ambiguities and silences only receive judicial deference when the interpretation is reasonable. *Util. Air Regul. Grp v. EPA*, 573 U.S. 302, 321 (2014). There are several reasons why the Lake Chesplain TMDL is unreasonable. First, the Lake Chesaplain TMDL is manifestly contrary to the statute. Second, adopting an annual metric would pose significant economic consequences which are contrary to Congressional intent. Third, EPA fails to demonstrate textual support for its interpretation in the Clean Water Act. Finally, the leap from daily to annual is unreasonable.

EPA's interpretation of CWA § 303(d) is manifestly contrary to the statute. Agencies do not receive a blank check for statutory creativity. To receive *Chevron* deference, "agencies must

operate within the bounds of reasonable interpretation." *Util. Air Regul. Grp.*, 573 U.S. at 321. In *Utility Air Regulatory Group*, the Supreme Court considered EPA's interpretation of the Clean Air Act. EPA tailored the Prevention of Significant Deterioration (PSD) and Title V permitting systems to greenhouse gases. *Id.* at 312. States categorize areas as attainment, nonattainment, or unclassifiable for each National Ambient Air Quality Standard (NAAQS) pollutant. *Id.* at 308. Under the PSD system, "every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant; thus, on EPA's view, all stationary sources are potentially subject to PSD review." *Id.* at 308. Under Title V, operation of a major source of pollution requires a permit. *Id.* at 309. Consequently, EPA's rule tailoring would incorporate a 2007 decision that the Clean Air Act, 42 U.S.C. § 7602(g) included greenhouse gases. This would have expanded the permitting systems to numerous previously unregulated small sources. *Id.* at 310–11. EPA sought to make this extension reasonable through creating a new regulation threshold of 100,000 tons emitted per year for greenhouse gases. The statute "require[d] permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant." *Id.* at 325. The Court asked "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." *Id.* at 314. The Court answered no. "EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provision." *Id.* at 325–26. While agencies have discretion to shade in details, agencies do not have the authority to redraw Congress's pictures. *Id.* at 326. "The Tailoring Rule is not just an announcement of EPA's refusal to enforce the statutory permitting requirements; it purports to alter those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act."

Id. at 326. Agencies cannot enact such changes, and this limitation is important to the separation of powers. *Id.* at 327 ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers."). Likewise, EPA colors outside the line in the Lake Chesaplain TMDL. Rather than filling in missing details or interpreting an ambiguous term, EPA attempted to rewrite statutory language. EPA endeavored to replace "daily" with "annual" in 33 U.S.C. § 1313(d)(1)(C) with no explanation.

Allowing TMDLs to encompass total maximum annual loads would result in great expenditure of agency resources, and the Twelfth Circuit should regard annual TMDLs with suspicion. The Supreme Court found it significant that applying PSD and Title V permitting requirements to greenhouse gases would impact a significant portion of the American economy. *Util. Air Regul. Grp.*, 573 U.S. at 324. "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Util. Air Reg. Group*, 573 U.S. at 324 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Changing the permitting system would require numerous new hearings, allow new interested parties to petition to block issuance of pending permits, and expose EPA to federal court challenges. *Id.* at 323. Annual TMDLs could raise comparable costs. Once a water is listed as impaired, states must submit a TMDL to EPA. The submission is subject to EPA review. R. at 6. If EPA disapproves a state's TMDL, EPA must develop its own TMDL. R. at 6. The TMDL process is complicated. States must identify waterbodies, pollutants of concern, population characteristics, affected wildlife, present and future pollution trends, the target water quality, and an overall plan for pollution reduction. EPA, Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992, 1–3 (1992). This is a time-intensive and expensive process. The

New Union Division of Fisheries and Environmental Control (DOFEC) failed to propose a TMDL or list Lake Chesaplain as an impaired water until CLW threatened suit in 2015. R. at 8. DOFEC initiated a state rulemaking proceeding, after which the Chesaplain Commission issued an extensive supplemental report. Concentrated animal feeding operations (CAFOs) objected to DOFEC's 2017 TMDL proposal. R. at 9. DOFEC adopted the CAFOs' position in its 2018 proposal, but EPA rejected the 2018 TMDL. Instead, EPA adopted the 2017 proposal in 2019 after notice and comment. R. at 10. This process was lengthy and devoured agency resources at the state and federal level. Meanwhile, New Union's tourism, fishing, and boating revenues declined. Allowing EPA and states to use total maximum annual loads could lengthen the approval process for pending TMDLs. It will also result in huge additional costs as the rest of the Twelfth Circuit reevaluates already-settled total maximum ***daily*** loads. According to the California State Water Resources Control Board, complicated TMDLs could cost more than $1 million to prepare. *Total Maximum Daily Loads (TMDL) Questions and Answers*, Cal. State Water Res. Control Bd., 1, https://waterboards.ca.gov/water_issues/programs/tmdl/docs/tmdl_factsheet.pdf (last accessed April 11, 2022). As a result, the court should find that EPA's TMDL is unreasonable.

EPA can cite no textual support for its interpretation. The situation in New Union resembles *MCI Telecomms. Corp. v. AT&T Co.*, where the Court held that the Federal Communications Commision's (FCC) interpretation of 47 U.S.C. § 203(b) was "not entitled to deference, since it goes beyond the meaning that the statute can bear." 512 U.S. 218, 219 (1994). Under § 203(a), communications common carriers must file tariffs with the FCC. *Id.* at 218. The FCC has statutory authority under § 203(b)(2) to "modify" filing requirements under § 203(a). *Id.* at 224. The Court questioned whether the Commission's elimination of the filing

requirement for some terrestrial common carriers was within the meaning of modify. *Id.* at 218. Ultimately, the court held that "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist." *Id.* at 231–32. Though *MCI* did not explicitly reach *Chevron* step two, it still yields valuable insight into the realm of reasonableness. After all, the original language of the Court barred deference to interpretations that were "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Lake Chesaplain's TMDL is analogous to *MCI*'s elimination of the filing requirement. If anything, § 1313(d)(1)(C) provides even less textual support for EPA's interpretation. It is true that § 1313(d)(1)(C) provides for seasonal fluctuations in pollutant discharge. However, there is no carveout provision in the CWA for any of § 1313(d)(1)(C)'s requirements. In contrast, 47 U.S.C. § 203(b) explicitly granted FCC discretion to adjust some of § 203(a)'s obligations.

Most importantly, EPA's interpretation of "total maximum daily load" to include "total maximum annual load" is unreasonable in itself. EPA provides no guide for the odyssey from daily to annual. While explanations may exist, and Lake Chesplain's uniquely deteriorated condition may suit a total maximum annual load, making this decision is beyond the province of the Judicial Branch. Congress has already confronted this question in drafting the CWA. Legislators have decided to codify a daily metric rather than an annual one.

Applicant Details

First Name	**Ethan**
Last Name	**Mackey**
Citizenship Status	**U. S. Citizen**
Email Address	**ebm2162@columbia.edu**
Address	**Address** Street **324 W 84th Street, Apt 33** City **NEW YORK** State/Territory **New York** Zip **10024** Country **United States**
Contact Phone Number	**5407591843**

Applicant Education

BA/BS From	**Johns Hopkins University**
Date of BA/BS	**December 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Tax Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Grossi, Peter
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ethan Mackey
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New York, NY 10024
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June 9, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student, Harlan Fiske Stone Scholar, and Editor-in-Chief of the *Columbia Journal of Tax Law* at Columbia Law School. I am writing to apply for a clerkship in your chambers beginning in 2024. As a native Virginian, I would be thrilled to return to my home state and begin my legal career there.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors John Coffee (jcoffee@law.columbia.edu), Brence Pernell (bpernell@law.columbia.edu), and Peter Grossi (ptgrossi47@gmail.com). In addition, Judge Elizabeth K. Dillon of the Western District of Virginia has agreed to serve as a reference. She can be reached through her judicial assistant Miriam Frazier (miriamf@vawd.uscourts.gov).

Thank you for your consideration. Should you have any questions, please reach out to me at (540) 759-1843 or ebm2162@columbia.edu.

Respectfully,

Ethan Mackey

Ethan Mackey

ETHAN MACKEY

324 W. 84th St., Apt. 33 • New York, NY 10024
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EDUCATION

Columbia Law School, New York, NY
J.D., expected May 2024
Honors: Harlan Stone Fiske Scholar
Activities: *Columbia Journal of Tax Law*, Editor-in-Chief
Real Estate Law Society, Vice President of Membership
Gastronomy Society, Vice President

Johns Hopkins University, Zanvyl Krieger School of Arts and Sciences**,** Baltimore, MD
B.A., received December 2020
Major: History
Minor: Jewish Studies
Honors: General Honors and History Department Honors
Dean's List
Thesis: "Papal Power in the Secular Realm: How the Personality of Gregory VII Defined the Investiture Controversy"
Activities: Alexander Hamilton Society, Co-President

EXPERIENCE

Venable, LLP Expected May – July 2023
Summer Associate

U.S. District Court for the Western District of Virginia, Roanoke, VA
Intern to the Hon. Judge Elizabeth K. Dillon May – July 2022
Drafted bench memoranda, orders, and opinions. Researched statutes and case law for topics including a Fourth Amendment § 1983 claim, a § 2255 motion to vacate, and a § 1782 motion for international discovery. Investigated legal precedent regarding COVID's effects on state tolling provisions. Observed various hearings and sentencings.

Testmax, Inc., Santa Monica, CA
LSAT Tutor March – August 2021
Provided remote, one-on-one instruction on the full range of LSAT preparation, including strategic approaches and time management techniques. Created personalized study plans for students with diverse capabilities.

Office of Senator Steve Daines, Washington, DC
Intern June – August 2019
Conducted research on illegal drug use in Montana in preparation for the senator's meeting with Vice President Mike Pence. Wrote statements for entry into the Congressional Record. Researched and drafted vote recommendations for the senator. Attended the senator's meetings with politicians and constituents.

Woods Rogers PLC, Roanoke, VA
Intern January 2019
Assisted trial counsel in civil litigation matters. Edited documents and reviewed records in preparation for trial.

Office of U.S. Representative Greg Gianforte, Washington, DC
Intern June – August 2018
Supported the office of the sole member of the U.S. House of Representatives from Montana. Answered hundreds of telephone calls and documented constituent comments. Led tours of the U.S. Capitol for visiting Montanans. Conducted research on the science curricula of Montana high schools.

INTERESTS: Home cooking, film history, Boy Scouts of America

Columbia Law School

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CLS TRANSCRIPT (Unofficial)

06/08/2023 20:56:31

Program: Juris Doctor

Ethan B Mackey

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B
L6354-1	Drug Product Liability Litigation	Arnold, Keri; Grossi, Peter; O'Connor, Daphne	2.0	A
L6241-1	Evidence	Capra, Daniel	4.0	A-
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6536-1	Bankruptcy Law	Mann, Ronald	4.0	B+
L6422-1	Conflict of Laws	Monaghan, Henry Paul	3.0	B+
L6169-2	Legislation and Regulation	Menand, Lev	4.0	B+
L9080-1	S. Black Letter Law / White Collar Crime [Minor Writing Credit - Earned]	Coffee, Jr., John C.; Rakoff, Jed	2.0	A-
L8373-1	S. Tax Deals Workshop	Mandel, Gary	2.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-2	Criminal Law	Seo, Sarah A.	3.0	B
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	B
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-33	Legal Practice Workshop II	Pernell, Brence	1.0	P
L6116-2	Property	Purdy, Jedediah S.	4.0	B+
L6118-1	Torts	Huang, Bert	4.0	A-

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-8	Legal Methods II: Impeachment	Bobbitt, Philip C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Sturm, Susan P.	4.0	B
L6133-6	Constitutional Law	Pozen, David	4.0	B
L6105-8	Contracts	Kraus, Jody	4.0	B
L6113-3	Legal Methods	Harcourt, Bernard E.	1.0	CR
L6115-33	Legal Practice Workshop I	Pernell, Brence; Whaley, Hunter	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 59.0
Total Earned JD Program Points: 59.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0

JOHNS HOPKINS
UNIVERSITY

ZANVYL KRIEGER SCHOOL OF ARTS & SCIENCES
Baltimore, MD 21218 www.jhu.edu/registrar

UNDERGRADUATE INTERNAL TRANSCRIPT

Student Name	Hopkins ID	Date of Birth	JHU Degree and Date Conferred	Date Printed
Mackey, Ethan Brian	918F62	02/07/xxxx	Bachelor of Arts 12/31/2020	5/28/2021

Year of Study	Major	Advisor	Page
Senior	History	Jelavich, Peter	1 of 3

Other Major(s)	Minor(s)
xxxxx	Jewish Studies

DIV	DEPT	CRSE #	COURSE TITLE		CRSE AREA	GRADE		CREDITS	GPA CREDITS	GPA PTS
Fall 2017			**Advanced Placement Examination**							
	APPM		Statistics EN.550.111		EQ			4.0		
	MATH		Calculus BC AS.110.108		Q			4.0		
						TOTAL		8.0		
Fall 2017					Pre-Major					
AS	GRLL	211.265	Panorama of German Thought		H	A-		3.0	3.0	11.1
AS	POLI	190.209	Contemp Int'l Politics		S	B		3.0	3.0	9.0
AS	PSYC	200.141	Foundations of Brain, Behavior and Cognition		NS	A		3.0	3.0	12.0
EN	ENTR	660.105	Introduction to Business		S	A-	*	4.0	4.0	14.8
EN	ENTR	660.250	Principles of Marketing			A		3.0	3.0	12.0
			TERM GPA	3.68		TOTAL		16.0	16.0	58.9
			CUM GPA	3.68		TOTAL			16.0	58.9
			Dean's List							
Intersession 2018					Pre-Major					
AS	FILM	061.104	Take the Money and Run: Heist Films		H	S		1.0	0.0	0.0
AS	HSCI	140.157	Saints and the Culture of Healing		HS	S		1.0	0.0	0.0
			TERM GPA	0.00		TOTAL		2.0	0.0	0.0
			CUM GPA	3.68		TOTAL			16.0	58.9
Spring 2018					Pre-Major					
AS	HIST	100.115	Modern Latin America		HS	A		3.0	3.0	12.0
AS	HIST	100.233	History of Modern Germany		HS	A		3.0	3.0	12.0
AS	HIST	100.237	FS: Impeachments and Beyond		HS	B+	*	3.0	3.0	9.9
AS	POLI	190.101	Intro American Politics		S	B+		3.0	3.0	9.9
AS	POLI	190.280	Political Persuasion		S	A-		3.0	3.0	11.1
			TERM GPA	3.66		TOTAL		15.0	15.0	54.9
			CUM GPA	3.67		TOTAL			31.0	113.8
			Dean's List							
Fall 2018					History					
AS	GRLL	210.101	French Elements I			B+		4.0	4.0	13.2
AS	GRLL	211.328	Berlin Between the Wars		H	A-		3.0	3.0	11.1
AS	HIST	100.193	Undergrad Sem in History		HS	B+	*	3.0	3.0	9.9
AS	IDEP	360.111	SOUL: Very Short Stories			S		1.0	0.0	0.0
EN	CLED	660.308	Business Law I		S	B		3.0	3.0	9.0
			TERM GPA	3.32		TOTAL		14.0	13.0	43.2
			CUM GPA	3.57		TOTAL			44.0	157.0
Spring 2019					History					
AS	GRLL	210.102	French Elements II			A-		4.0	4.0	14.8
AS	GRLL	211.347	Monsters, Ghosts, and Golems		H	A-		3.0	3.0	11.1
AS	HIST	100.194	Undergrad Sem in History		HS	A-	*	3.0	3.0	11.1
AS	HIST	100.310	The French Revolution		HS	A		3.0	3.0	12.0
AS	ISLM	194.201	Jews, Muslims, and Christians		HS	A+		3.0	3.0	12.0
			TERM GPA	3.81		TOTAL		16.0	16.0	61.0
			CUM GPA	3.63		TOTAL			60.0	218.0
			Dean's List							
Fall 2019					History					
AS	GRLL	210.201	Intermediate French I		H	A-		3.0	3.0	11.1
AS	HIST	100.328	Caged America		HS	A		3.0	3.0	12.0

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Senior	History	Jelavich, Peter	

Other Major(s)	Minor(s)
xxxxx	Jewish Studies

DIV	DEPT	CRSE #	COURSE TITLE	CRSE AREA	GRADE		CREDITS	GPA CREDITS	GPA PTS
AS	HIST	100.373	Crime, Punishment, Felony and Freed	HS	A-		3.0	3.0	11.1
AS	IDEP	360.111	SOUL: Communicating Disease Risks		S		1.0	0.0	0.0
AS	ISLM	194.105	Islam Cultural Religious Diversity	H	A+		3.0	3.0	12.0
AS	POLI	190.333	Amer Constitutional Law	S	A		3.0	3.0	12.0
			TERM GPA 3.88		TOTAL		16.0	15.0	58.2
			CUM GPA 3.68		TOTAL			75.0	276.2
			Dean's List						
Intersession 2020				History					
AS	CTAL	300.214	Philosophy and Television	H	S		1.0	0.0	0.0
AS	HIST	100.259	Baseball, Broadway and Blackface	HS	S		1.0	0.0	0.0
			TERM GPA 0.00		TOTAL		2.0	0.0	0.0
			CUM GPA 3.68		TOTAL			75.0	276.2
Spring 2020				History					
AS	EASS	310.222	The Religions of Korea	H	S*		3.0	0.0	0.0
AS	GRLL	210.202	Intermediate French II	H	S*		3.0	0.0	0.0
AS	HIST	100.536	Independent Study		S*	*	3.0	0.0	0.0
AS	ISLM	194.401	Themes in Medieval Islamic Thought	HS	S*		3.0	0.0	0.0
AS	POLI	190.334	Constitutional Law	S	S*		3.0	0.0	0.0
			TERM GPA 0.00		TOTAL		15.0	0.0	0.0
			CUM GPA 3.68		TOTAL			75.0	276.2
			Due to the global COVID-19 pandemic, final grades for all undergraduate students in Spring 2020 semester-long and second-half semester courses were reported as Satisfactory/Unsatisfactory. Final grades for courses completed in the first half of Spring 2020 were unaffected.						
Fall 2020				History					
AS	FILM	061.140	Introduction to Cinema, 1892-1941	H	A		3.0	3.0	12.0
AS	FILM	061.154	LCA: Bogart	H	S		1.0	0.0	0.0
AS	GRLL	211.333	Representing the Holocaust	H	A-		3.0	3.0	11.1
AS	HIST	100.507	Senior Thesis		A	*	3.0	3.0	12.0
AS	NEAS	134.101	GOD 101: The Early History of God	H	A-		3.0	3.0	11.1
AS	POLI	191.335	Arab-Israeli Conflict	S	A-		3.0	3.0	11.1
			TERM GPA 3.82		TOTAL		16.0	15.0	57.3
			CUM GPA 3.71		TOTAL			90.0	333.5
			Dean's List						
			Due to the global COVID-19 pandemic, the default final grades in Fall 2020 courses for all undergraduate students were Satisfactory/Unsatisfactory (S/U). Students had the option to change to a letter grade in any course, unless it was offered Satisfactory/Unsatisfactory only (S/U).						

CUMULATIVE GPA 3.71
TOTAL D/D+ CREDITS 0.0

TOTAL DEGREE CREDIT REQUIREMENT (based on degree and major)

Total Degree Credit Requirement		120.0
Total Credits Applied		120.0
JHU Credits in Residency Applied (100 required)	112.0	
Non-Residency Credits Applied	8.0	

Advisors:
Cox, Anita M. 08/31/2017 - 12/31/2020
Stahl, Neta 01/27/2020 - 12/31/2020
Jelavich, Peter 05/29/2018 - 12/31/2020 - (Primary Advisor)

Graduated with General Honors
Departmental Honors, History

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*******End Of Transcript*******

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend most enthusiastically Ethan Mackey for a position as one of your future clerks. Ethan was a student in my Drug Product Liability Litigation seminar at Columbia Law School in 2023. I believe he would make an excellent member of your chambers. In all the important attributes for a clerk -- analytical ability, legal writing, precision, intellectual honesty – Ethan is first-rate.

By way of background, my course at Columbia is the outgrowth of 40 years of litigation at Arnold & Porter, where I was chair of its Litigation Department. In that capacity, I have had the opportunity to work with many fine young attorneys; and I believe Ethan measures up extremely well with them in terms of both her intellectual rigor and interpersonal skills.

My course at Columbia is a bit unusual in that, in addition to the “black letter” law applying product liability principles to complex pharmaceutical cases, we cover a number of topics concerning issues involved in scientific proof and some of the other, more practical aspects of such litigation. Ethan’s performance throughout the course was superb.

In terms of evaluations, the course includes a substantial “bench memorandum” as a midterm and then a more traditional final exam. The midterm exercise required the students to formulate the best arguments for each side on a summary judgment motion based on the evolving Supreme Court cases on FDA preemption of product liability claims as applied to a rather complicated set of hypothetical facts – and then to recommend an outcome. The final covered a wide range of legal and scientific issues.

Ethan’s performance on both projects was outstanding. His bench memorandum quickly got to the heart of the problem, thoughtfully analyzed the facts supporting each side of the motion (from a hypothetical set of facts rather different from those presented to the Court), and then marshaled the authority to support her recommendation in an extremely effective manner. His writing style was clear and concise; his form was excellent.

Ethan’s performance on the final exam was also outstanding. The primary question required the students to evaluate the admissibility of a clinical study (an atual studied copied from JAMA) in the context of a detailed set of medical facts concerning the hypothetical plaintiff. Ethan’s answer was appropriately nuanced and demonstrated an excellent grasp of Daubert principles. Based on my experience (albeit many years ago) as a clerk on the Second Circuit, I think Ethan’s work on both projects shows the type of analysis a judge would prize.

Finally, I would note that Ethan is a very personable young man who gets along well with both peers and seniors. And he clearly possesses a strong work ethic and a seriousness of purpose that is good to see in any young person.

If you would like to discuss Ethan in any further detail, I would be honored if you were to call (703-919-1590).

Sincerely,

Peter T. Grossi

Peter Grossi - ptgrossi47@gmail.com

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter of recommendation with great pleasure on behalf of Ethan Mackey, who has applied for a law clerk position in your chambers. Ethan was one of my 2021-2022 students in Columbia Law School's Legal Practice Workshop, a required first-year course that introduces students to legal writing and research. Ethan returned to work with me in that same course as a teaching assistant during his second year.

I have a sense of what it generally takes to be a successful law clerk. I clerked for Judge J. Michelle Childs, then of the U.S. District Court for the District of South Carolina, and for then Chief Judge Theodore McKee of the U.S. Court of Appeals for the Third Circuit. Because I've worked with Ethan so closely these last two years, I can confidently attest to his outstanding qualifications and commendable work ethic that also would make him a successful law clerk.

First, throughout our time working together, Ethan exhibited exemplary professionalism and dedication to his responsibilities, both as a student and as a teaching assistant. He consistently went above and beyond what was expected of him, demonstrating a remarkable ability to manage multiple tasks simultaneously while maintaining the highest standards of quality and accuracy in his writing, and in his feedback to students about their writing. His strong organizational skills and effective time management allowed him to successfully handle a heavy workload, ensuring that all assigned tasks were completed within tight deadlines.

But the most special part about my work with Ethan has been bearing witness to his incredible growth over the last two years—from a first-year law student with no legal writing experience, to now a first-rate legal writer. His endearing natural inquisitiveness and strong analytical skills were evident from the first day he stepped into my classroom. And over time, Ethan added to those qualities his exceptional research and writing abilities. He has consistently displayed an impressive ability to conduct thorough legal research to provide comprehensive and well-reasoned legal opinions. Moreover, his excellent writing skills are reflected in his ability to draft clear and concise legal documents, including memos, briefs, and correspondence.

In addition to his technical skills, Ethan possesses commendable interpersonal skills. As my student, he was always respectful, even when he sometimes disagreed with colleagues. As my teaching assistant, he struck the perfect balance of criticism and support for students to whom he was responsible providing written and verbal feedback. Overall, he has proven to be a superb team player, actively collaborating with his student colleagues and contributing to a positive and supportive classroom environment. His strong communication skills, both written and verbal, allowed him to effectively interact with both me and his colleagues.

His combination of technical and interpersonal skills has no doubt contributed to his success as the Editor-in-Chief of Columbia Journal of Tax Law at Columbia Law and as an intern law clerk at the U.S. District Court for the Western District of Virginia. And I know they will serve him well as a summer associate this summer at Venable LLP.

I wholeheartedly recommend him for the law clerk position in your chambers. His dedication, competence, and unwavering commitment to excellence make him an invaluable asset to any legal team. I have no doubt that he would contribute greatly to your chambers and continue to thrive in their legal career.

Should you require any further information or have any questions regarding Ethan's qualifications, please do not hesitate to contact me.

Sincerely,

Brence Pernell

bdp2124@columbia.law.edu
(803)-270-4583

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Ethan Mackey, currently a third-year and graduating student at Columbia Law School, has applied to you for a clerkship, and this letter is written in enthusiastic support thereof.

Mr. Mackey was a student last Fall in the seminar that I have long jointly taught with United States Senior District Judge Jed Rakoff on white-collar crime and its prosecution. Mr. Mackey performed well in this seminar, participated actively, and wrote a lucid and thoughtful paper (to which we gave an A-). This was one of the better seminar papers that we received last year.

In other law school activities, he is editor-in-chief of the Columbia Journal of Tax Law and has served as a teaching assistant in other courses. One other observation about his background may say a good deal about his character: he was an Eagle Scout in the Boy Scouts, growing up in Virginia, and I would describe his personality as fully consistent with that image: that is, he cuts square corners, appears reliable and industrious, and is quietly self-assured. He is far from a flamboyant person, but that is probably not a characteristic that you are searching for.

It may also be relevant that he has already served as an intern to a United States district judge and thus is less “green” and inexperienced than the typical recent law graduate beginning a clerkship. In other words, he has some sense of the court’s work and its needs.

In terms of his career goals, my understanding is that he wants to be a litigator specializing in fields such as white-collar crime and/or products liability. He seems to enjoy legal research and finding the answer to specialized problems.

All in all, I see no downside to him and considerable upside, as he is agreeable, eager to learn, and industrious. Moreover, he writes in a clear, lucid manner. If I can answer any additional questions about him, please do not hesitate to contact me, but I am convinced that the judge who hires him will find him to be a de-voted clerk that the judge will enjoy working with.

Yours truly,

John C. Coffee, Jr.
Adolf A. Berle Professor of Law

John Coffee - jcc2@columbia.edu - 212-854-2833

ETHAN MACKEY
324 W. 84th St., Apt. 33 • New York, NY 10024
(540) 759-1843 • ebm2162@columbia.edu

Writing Sample

The following document is a draft opinion I wrote during my internship in the chambers of the Hon. Elizabeth K. Dillon of the U.S. District Court for the Western District of Virginia. The opinion deals with a landowner's suit against county zoning officials brought under 42 U.S.C. § 1983, alleging separate violations of his Fourteenth and Fourth Amendment rights. In response, the zoning officials filed a motion for summary judgment. This draft is used with Judge Dillon's permission; all names of people and places have been changed. For the sake of brevity, I have removed some of the factual background. This sample has been lightly edited for clarity and grammar by others.

MEMORANDUM OPINION

William Carson owned property in Powhatan County from was subject to zoning enforcement by the defendants in their roles as Powhatan County employees. He alleges that this enforcement treated him differently than other property owners with similar violations, violating his rights under the Equal Protection Clause of the Fourteenth Amendment. Carson also claims that defendant Grant Stanton's unauthorized entry to his property infringed his Fourth Amendment rights. The defendants move for summary judgment on both claims. Dkt. No. 42.For the reasons stated below, the motion for summary judgment is granted for both claims.

I. BACKGROUND

A. The Parties Prior to Stanton's Visit to the Property

The defendants in this case are Powhatan County employees, Grant Stanton, Aiden Myers, and Deborah Thatcher. All three defendants were employed by the Powhatan County Planning Department during the enforcement action against the Property. Stanton was the Deputy Planning Director & Floodplain Manager. Myers worked as the Deputy Zoning Administrator until August 2019 when he became the Zoning Administrator. Thatcher served as the Planning Director. On May 2, 2017, the plaintiff William Carson purchased a 6.667-acre parcel in Powhatan County (The Property). The Property is part of the flood plain in the Powhatan County Special Flood Hazard Area and sits on the bank of the Willis River. On the Property, there are several structures: a deck, a ramp with stairs, a hoop house/greenhouse, and two garages. None of these structures are a residence. Carson Dep. 59, Dkt. No. 45–1.

B. Stanton's Visit to the Property

On January 11, 2019, Stanton viewed images of the flood plain from an aerial Geographic Imaging Survey to prepare for a Community Assistance Visit from Federal

Emergency Management Agency (FEMA). FEMA performs these visits to rate counties' flood preparedness in order for residents to receive deductions on their flood insurance . Stanton Dep. 28, Dkt No. 43–26. During his review of the survey data, Stanton observed the Property and informed Myers of what he had seen. Stanton Dep. 53. When Myers researched whether the structures on the Property had permits, he accurately found that none of them had building permits. Myers Dep. 22, Dkt. No. 43–28.

Also on January 11, 2019, Stanton accessed the property without the permission or knowledge of Carson. Carson had posted on the Property, "No Trespassing" signs which Stanton bypassed when he entered the Property. Carson Dep. 118. Stanton proceeded 500 feet onto the Property while remaining approximately 100 feet from all of the structures. Stanton Dep. 46–47. However, Stanton did not disclose his visit or any violations he had seen to Myers until after Carson filed the lawsuit. Stanton Decl. ¶ 7, Dkt. 43–27. Consequently, Myers's choice to issue a notice of violation (NOV) to Carson was not based on any information obtained from Stanton's visit to the property. Myers Dep. 99 –100; Stanton Dep. 51.

C. The Aftermath of Stanton's Visit to the Property

Myers issued a NOV for the Property to Carson on January 16, 2019. This was Carson's first interaction with any of the defendants. On February 8th, 2019, Carson and Myers met at the Property, making this the first time Myers had been to the Property. Myers Dep. 36. After this meeting, Carson and Myers were unable to reach an agreement about what permits were required for the structures. Nevertheless, they did agree to let FEMA visit the Property during the Community Assistance Visit (CAV) to give its opinion on the structures. Dkt. No. 48–27.

After the CAV, Carson received a FEMA Site Visit and Staff Determination Letter from Stanton. Dkt. Nos. 43–2, 9–21. This letter was consistent with the letters received by other

property owners who were part of the CAV. Stanton Dep. 99. Also, after the CAV, Myers informed Carson that the Property's structures still required building permits. Myers supplied Carson with an agricultural exemption application, which Carson completed. Even with this completed exemption form, Myers still believed that the structures required permits. Because of their continued dispute, on May 1, 2019 Myers issued a zoning determination to allow Carson to appeal his decision to the Board of Zoning Appeals (BZA). Finding that all structures except the deck and ramp were agriculturally exempt, the BZA overturned the majority of the zoning determination, based on the exemption Carson had filed. Dkt. No. 43–23. For the deck, the BZA required Carson to submit a zoning permit application and pay a $10 application fee, which Carson then did. *Id*. This settled the zoning issue for the Property.

D. The Present Lawsuit

On October 4, 2019, Carson brought a suit against Myers, Stanton, Thatcher, and Powhatan County. In his complaint, Plaintiff presented two claims against Myers, Stanton, Thatcher, and Powhatan County; he alleged (1) that his property rights were infringed under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 (a class-of-one claim) and (2) that his property rights were infringed under the Fourth Amendment as applied through the Fourteenth Amendment and 42 U.S.C. § 1983. Dkt. No. 16. The defendants then submitted a motion to dismiss for failure to state a claim under Rule 12(b)(6). Dkt. No. 19. The court issued an opinion dismissing Powhatan County as a defendant and removing Myers and Thatcher from the Fourth Amendment claim. Dkt. No. 30. After discovery, the defendants moved for summary judgment on the remaining claims, alleging that Carson had failed to establish any genuine issues of material fact. Dkt. No. 42.

II. ANALYSIS

A. Motion for Summary Judgment

Under Federal Rule of Civil Procedure 56(a), summary judgment should be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it could determine the outcome of the case. *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, it is the burden of the moving party to show the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). After this showing has been made, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing Fed. Rule Civ. Proc. 56(e)). If the nonmoving party is unable to provide facts that show a genuine issue for trial, then the granting of summary judgment is proper. Fed. R. Civ. P. 56(e)(3).

When considering a motion for summary judgment, the court does not "weigh the evidence"; instead, the court determines whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248–250. For this determination, the evidence, inferences, and arguments of the case are considered in the most positive light for the nonmoving party. *Martin v. Duffy*, 977 F.3d 294, 298 (4th Cir. 2020).

1. Equal Protection Class-of-One Claims

A class-of-one determination can be made when the plaintiff has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Nes v. Anne Arundel County*, 95 F. App'x. 497, 500 (4th Cir. 2004) (dividing class-of-one claims into three distinct parts: treated differently than others similarly situated, intentional, and not rational).

"For a plaintiff to demonstrate that she is 'similarly situated,' her evidence 'must show an extremely high degree of similarity between [herself] and the persons to whom [she] compare[s]' herself." *Willis v. Town of Marshall*, 275 F. App'x. 227, 233 (4th Cir. 2008) (citing *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)); *see Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 640 (1st Cir. 2013) ("But a class-of-one plaintiff bears the burden of showing that his comparators are similarly situated in all respects relevant to the challenged government action."). As such, a class-of-one claim must present comparable examples of others receiving different treatment in similar situations. *See Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002). This issue of similarity is a question of fact for the jury. *Id*. at 439.

Class-of-one claims are subject to rational basis review. *See Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 559 (4th Cir. 2013). To survive rational basis review, the government must show that its actions were "rationally related to a legitimate government interest." *Thomasson v. Perry*, 80 F.3d 915, 946 (4th Cir. 1996). This is an objective test. *See Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). Regardless of the government's actual motivation, as long as there is a plausible and reasonable justification for the government's act, rational basis is satisfied. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). When there is not a rational basis for the government's actions, the court determines whether the defendants acted intentionally by comparing their actions to how they treated those similarly situated. *See generally King v. Rubenstein*, 825 F.3d 206, 221 (4th Cir. 2016) (finding intentionality by comparing the plaintiff to two similarly situated inmates with no rational reason to treat them differently).

Defendants' actions satisfy the rational basis test, meaning Carson's class-of-one claim is without merit. Carson presents twelve comparator properties which he claims are similar to the

Property. For the comparator properties to be relevant comparisons, they must be extremely similar to the Property. *See Willis*, 275 F. App'x. at 233. Carson asserts that the comparator properties are in the same flood hazard area as the Property, contain violations visible on the GIS or from public roads, and violate the same section of the Powhatan County Zoning Code, 180-16.F. The defendants argue that the comparator properties differ from Carson's property too much to meet the threshold of substantial similarity. They point to the presence of dwellings on the comparator properties and the fact that the comparator properties were in a different zoning area with distinct rules. In particular, the comparator properties' zoning district allows additional structures to be built without permits as long as there is a dwelling on the land. Stanton Dep. 177–178. The Property's zoning district does not have this privilege. *See* Myers Dep. 32–33. Regardless of these differences, there is clear rational for any difference in treatment between the Property and the comparators. The defendants were unaware of the comparator property violations; Myers Decl. ¶ 9, Dkt. No 43–26; Stanton Decl. ¶ 10. Even construing the facts in a way most favorable to the plaintiff, there is simply nothing in the record showing that the defendants were aware of the violations at the comparator properties.

Even if it is assumed that the properties are valid comparators and that Stanton knew about some or all of them, Stanton still only treated the Property differently in one way. Stanton informed Myers of the Property but did not let him know about the comparator properties. The defendants' reason for this difference is that the newly cleared land on the Property made its violations blatantly clear to Stanton. Stanton Dep. 176–177. Though Carson has denied that the Property's violations were any more blatant than those of the comparator properties, he has not alleged specific facts that show this. As such, the obvious nature of the Property's violations is a rational reason for Stanton informing Myers of the Property and not the others. Stanton's

decision to enter the Property, though unique to the Property, did not play any role in the enforcement against the Property. Myers Dep. 99–100; Stanton Dep. 51.

Carson claims that the comparator properties received more lenient enforcement than the Property. Specifically, he asserts that the defendants' actions were faster and more aggressive with the enforcement against the Property. Pl.'s Mem. Opp'n. Summ. J. at 13, Dkt. No. 48. The defendants argue that Myers's enforcement actions were consistent with how he treated the majority of properties with violations. Myers Decl. 4–6. Also, after the CAV, Stanton was the one to follow up with the comparator properties, as a follow-up by staff was the typical practice when a violation was confirmed in the field. Stanton Dep. 151. Carson argues that the comparator properties were treated more gently and were given more time to resolve their issues. However, Myers put enforcement "on hold" for the Property to allow FEMA to provide input during the CAV. Dkt. No. 48–27. The primary difference then between the comparator properties and the Property is that the comparator properties received a visit before receiving any notice from staff. However, in the case of the Property, the violation was readily apparent without a visit, so there was no need to wait until after the CAV to begin the correspondence. *See* Dkt. No. 43–24.

Carson also claims that Myers repeatedly changed his assessments of what kinds of permits would be required for the Property. Carson has not asserted specific facts that support this claim. Instead, Carson has provided documents that show a consistent effort from Myers to ensure the Property's structures follow the Zoning Ordinance. Dkt. No. 48–24, 26, 27, 30. Even if Myers's assessment of the Property did change after issuing the NOV, it is rational that a zoning official may change their assessment as they gather more information. These documents likewise match Myers's claim that he acted in the way that he thought would best enforce the

Zoning Ordinance. Myers Dep. 134–135. Carson disputes Myers's goal but provides no evidence to show he acted with different motivations. Regardless of Myers's motivation, rational basis only requires an objectively rational motive for the government action, and here, upholding the Zoning Ordinance satisfies that.

The defendants had a rational basis to treat the Property differently than the comparator properties. The treatment of all the properties fulfills a legitimate government objective to have zoning regulations enforced when government actors are aware of violations on properties. Regardless of whether the defendants' acts were intentional or whether the comparators were similarly situated, Carson's class-of-one claim cannot succeed. Because of this, there is no genuine dispute of material fact between the parties. The defendants' motion for summary judgment on the class-of-one claim is granted.

2. Fourth Amendment Claims

"The ultimate touchstone of the Fourth Amendment is reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). To ascertain if a claim is reasonable, the court must determine "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A legitimate expectation of privacy exists when the individual has a (1) subjective expectation of privacy in the area searched, and (2) society is willing to recognize that expectation as legitimate. *United States v. Castellanos*, 716 F.3d 828, 832 (4th Cir. 2013).

The government's entry into an area protected by the Fourth Amendment without permission for the purpose of obtaining information is an unlawful search. *United States v. Jones*, 565 U.S. 400, 406 n.3. (2012). To determine if an area outside the home is protected by the Fourth Amendment, it must be determined whether that area is within the curtilage of the

home or conversely is considered part of the open fields. *United States v. Breza*, 308 F.3d 430, 435 (4th Cir. 2002); *see Hester v. United States*, 265 U.S. 57, 59 (1924). While the curtilage of the home has a reasonable expectation of privacy and is protected, an area like a field is not protected according to the "open fields doctrine". *Oliver v. United States*, 466 U.S. 170, 180 (1984); *see Shafer v. United States*, 229 F.2d 124, 128–129 (4th Cir. 1956) (holding fields used for agriculture can be open fields); *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001) (finding that the curtilage of the home receives the same Fourth Amendment protections as the home itself).

To make this distinction between open fields and curtilage, the court uses the four factors identified by the Supreme Court in *United States v. Dunn*, 480 U.S. 294, 307 (1987). These factors are (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. *Dunn*, 480 U.S. at 307; *e.g. United States v. Smith*, 456 F. App'x. 200, 207–208 (4th Cir. 2011); *United States v. Hooper*, No. 21-4220, 2022 WL 1184181, at *2 (4th Cir. Apr. 21, 2022). The court weighs these factors to decide whether the place is "so intimately tied to the home" that it ought to be part of the "umbrella" of the home's protection. *Dunn*, 480 U.S. at 301; *United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013).

Fourth Amendment protection from unlawful search and seizure is separate from state laws preventing trespass. *Jones*, 565 U.S. at 406 n.3.; *see Oliver*, 466 U.S. at 183. This is because Fourth Amendment protection does not depend on any specific property rights. *Rakas*, 439 U.S. at 143. Additionally, the government official's beliefs as to the legality of an act have no relevance when determining whether a government act violated the Fourth Amendment.

Whren v. United States, 517 U.S. 806, 814 (1996). Instead, the court must objectively examine the reasonableness of the government official's conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011). The Supreme Court has made it clear that the Fourth Amendment protects people from certain government conduct, not the thoughts of the actor. *Id*.

There is no genuine dispute of material fact regarding the Fourth Amendment claim. None of the structures on the Property are a residence or dwelling. Carson Dep. 59. Without a home on the Property, there is no "umbrella" of Fourth Amendment protection to extend. *Dunn*, 480 U.S. at 301. Applying the *Dunn* factors, (1) there is no proximity between the part of the Property Stanton entered and the home, because there is no home on the Property. Additionally, (2) the property was not enclosed at the time.[1] Stanton Dep. 45. (3) The nature of the Property is agricultural, a use repeatedly found to coincide with open fields. *See Shafer v. United States*, 229 F.2d 124, 128–129 (4th Cir. 1956*); Janney v. United States*, 206 F.2d 601, 602 (4th Cir. 1953); *United States v. Campbell*, 395 F.2d 848, 848 (4th Cir. 1968). Contrastingly, (4) Carson's "No Trespassing" signs and gate indicate he put forth effort to prevent passersby from observing the area. Taken together, these factors show that Carson's property ought not to have the umbrella of the home's protection, because the Property does not contain a home. Therefore, the court considers the entirety of Carson's property an open field rather than curtilage of the home. Under the "open fields doctrine" Carson has no reasonable expectation of privacy for the Property.[2]

[1] Though Carson's deposition mentions a fence, this fence did not enclose the Property. Carson Dep. 118.
[2] Stanton also asserted that he was entitled to qualified immunity on the Fourth Amendment claim. When a federal right has not been violated, a defendant has no need of qualified immunity. *Abney v. Coe*, 493 F.3d 412, 415 (4th Cir. 2007). As such, the court finds Stanton's claim of qualified immunity to be unnecessary.

III. CONCLUSION

For the reasons stated herein, the court will issue an appropriate order granting the motions for summary judgment.

Applicant Details

First Name	**Alexander**
Last Name	**MacLennan**
Citizenship Status	**U. S. Citizen**
Email Address	**alex.maclennan@berkeley.edu**
Address	**Address** Street **1833 Spruce St** City **Berkeley** State/Territory **California** Zip **94709** Country **United States**
Contact Phone Number	**5135359166**

Applicant Education

BA/BS From	**University of Cincinnati**
Date of BA/BS	**April 2018**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of International Law** **Berkeley Journal of Criminal Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**McBaine Honors Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Tomlins, Christopher
ctomlins@law.berkeley.edu
Chemerinsky, Erwin
echemerinsky@berkeley.edu
Grillo, Evelio
egrillo@alameda.courts.ca.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEX MACLENNAN

5706 Chestnut Ridge Dr, Cincinnati, OH, 45230 • alex.maclennan@berkeley.edu • 513-535-9166

Alex MacLennan
5706 Chestnut Ridge Drive
Cincinnati, OH 45230

June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at the University of California, Berkeley, School of Law with a top 15% 2L academic distinction and am an Editor-in-Chief of the *Berkeley Journal of Criminal Law*. I am writing to apply for a 2024-25 clerkship in your chambers.

Enclosed please find my resume, law school transcripts, and writing sample. The writing sample is from my Law & History Foundation Seminar paper, which examines the history of the Third Amendment and its modern application. A second writing sample from my moot court brief where I made it to the semi-finals of the competition and accepted a moot court competition student director position for 2023-24 is available upon request. Letters of recommendation from the following three recommenders are also included.

Dean Erwin Chemerinsky
Dean & Jesse H. Choper Distinguished Professor of Law
echemerinsky@law.berkeley.edu

Judge Evelio Grillo
Lecturer at the University of California, Berkeley, School of Law
egrillo@alameda.courts.ca.gov

Professor Christopher Tomlins
Elizabeth Josselyn Boalt Professor of Law
ctomlins@law.berkeley.edu

If there is any other information that may be helpful to you, please let me know. Thank you for your consideration.

Very truly yours,

Alex MacLennan

ALEX MACLENNAN

5706 Chestnut Ridge Dr, Cincinnati, OH, 45230 • alex.maclennan@berkeley.edu • 513-535-9166

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
Juris Doctor Candidate, Expected Graduation May 2024
Honors: Second-Year Academic Distinction (Top 15%)
Awards: Jurisprudence Award (highest grade) in Evidence (Fall 2022)
Activities: *Berkeley Journal of Criminal Law* (2023-24 Editor-in-Chief)
Berkeley Journal of International Law
McBaine Moot Court Competition (2022-23 Semi-Finalist, 2023-24 Student Director)
Publications: Berkeley Journal of Criminal Law Blog
Adultery Laws: 19th Cheat Code for the 21st Century?
R v Brown: Constitutional Questions Answered, Normative Ones Raised
Berkeley Journal of International Law Blog (Travaux)
Animals vs. Walls: The Effects of Border Barriers on Animal Populations
The Commonwealth Without Queen Elizabeth II: Is the Sun Setting on the Monarchy's Overseas Role?

The Ohio State University Moritz College of Law, Columbus, OH
Completed First-Year Juris Doctor Curriculum, Aug. 2021 – May 2022; Rank: 8/175, GPA: 3.9
Awards: Invited to join *Ohio State Law Journal* on the basis of academic achievement
CALI Excellence for the Future Award® (highest grade) in Contracts I (Spring 2022)
Dean's Scholar Award; Eminent Scholarship
Activities: 1L Moot Court Competition; Professional & Graduate School Trivia
Study-abroad: University of Oxford Summer Law Program, Oxford, UK, Summer 2022

University of Cincinnati, Cincinnati, OH
Bachelor of Science in Industrial Design, Apr. 2018
Awards: Cincinnatus Scholarship
Worked 5-15 hours per week throughout year to fund education

EXPERIENCE

Frost Brown Todd LLP, Cincinnati, OH — May 2023 – July 2023
Summer Associate, Litigation and Appellate Focused

Seeking Alpha, Remote Work
Freelance Financial Commentary Writer — Oct. 2015 – Apr. 2021
Wrote financial and investment articles for online publication. Articles analyzed companies, economic issues, and investment ideas with a focus on stocks, preferred stocks, and bonds.

Thyssenkrupp Bilstein, Hamilton, OH
Product Designer — Jan. 2017 – Apr. 2017, Aug. 2017 – Dec. 2017
Led the company's first aesthetic design team in Hamilton, OH. Collaborated with engineering, marketing, and management in Ohio, California, and Germany. Presented new products, building redesign ideas, and marketing strategy.

U.S. Senate, Office of Senator (Ohio), Cincinnati, OH
Intern — Sep. 2012 – Mar. 2013
Responded to constituent questions and concerns and conducted research about policies.

ADDITIONAL INFORMATION

Certificates: Financial Programming and Policies, Part 1: Macroeconomic Accounts & Analysis (edX – International Monetary Fund), La Terre comme système: une approache géographique (edX – Sorbonne Université)
Interests: History, trivia, travel (domestic and international), economics and finance, vintage coats, trying new foods
Favorite Law-Themed TV Shows: *Law & Order, Ally McBeal, Better Call Saul*

Berkeley Law
University of California
Office of the Registrar

Alexander MacLennan
Student ID: 3038690332
Admit Term: 2022 Fall

Academic Program History
Major: Law (JD)

Awards

Jurisprudence Award 2022 Fall: Evidence

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	H
LAW	241	Evidence Jonah Gelbach	4.0	4.0	HH
LAW	251.52	Economics of Corp & Secur Lit. Matthew Cain	1.0	1.0	CR
LAW	251.72	Storytelling for Corporate Law **Units Count Toward Experiential Requirement** Aaron Zamost	1.0	1.0	CR
LAW	262.81	Anticorruption Compliance Hana Ivanhoe	1.0	1.0	CR
LAW	267.4	Law, Hist Found Sem **Fulfills Writing Requirement** Christopher Tomlins	3.0	3.0	HH

Transfer Credits	Units	Law Units
Ohio State Univ College of Law	27.0	27.0
Ohio State Univ College of Law.	3.0	3.0
Units Count Toward Experiential Requirement		

	Units	Law Units
Term Totals	44.0	44.0
Cumulative Totals	44.0	44.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** Andrew Dilworth	2.0	2.0	H
LAW	220.9	First Amendment Kenneth Bamberger	3.0	3.0	H
LAW	230.9	Where Civil & Crim Law Collide Jed Rakoff	1.0	1.0	CR
LAW	231.1	Crim Procedure- Adjudication Hadar Aviram	4.0	4.0	HH
LAW	242.9	Listening and Communicating **Units Count Toward Experiential Requirement** George Higgins	1.0	1.0	CR
LAW	245.2	Civil Trial Practice **Units Count Toward Experiential Requirement** Winifred Smith Evelio Grillo	3.0	3.0	P
LAW	295.3J	McBaine Moot Court Competition **Units Count Toward Experiential Requirement** Gregory Washington	2.0	2.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	60.0	60.0

Carol Rachwald, Registrar

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Berkeley Law
University of California
Office of the Registrar

Alexander Maclennan
Student ID: 3038690332
Admit Term: 2022 Fall

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	220.43	Constitutional Interpretation John Yoo Steven Hayward Janice Brown	1.0	1.0	
LAW	222	Federal Courts William Fletcher	3.0	3.0	
LAW	245.23	Evidence Adv and Trial Obj	1.0	1.0	
		Units Count Toward Experiential Requirement			
LAW	246.1	Criminal Trial Practice	3.0	3.0	
		Units Count Toward Experiential Requirement Charles Denton			
LAW	251.12	Adv Topics Delaware Corp Law Steven Solomon	1.0	1.0	
LAW	261.73	Self Determ. Ppl in Intern Law Asa Solway	1.0	1.0	
LAW	277.1	Trade Secret Law David Almeling	2.0	2.0	
LAW	285.33	How to Thnk and Wrt Lk a Judge	1.0	1.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	60.0	60.0

Carol Rachwald, Registrar

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Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

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1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

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Adrienne Bricker
University Registrar

Name:Alexander MacLennan
Student:500593939
DOB:06/22/**
Print Date:06/14/2022
Page 1 of 1
STUOF-ISSUED TO STUDENT

ALEXANDER MACLENNAN
5706 CHESTNUT RIDGE DR
CINCINNATI OH 45230-3591

Institutions Attended

University of Cincinnati

Beginning of Law Record

Autumn 2021 Semester

Program: Law School
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	6103	Law 1	2.00	2.00	96	8.000
LAW	6109	Torts	4.00	4.00	93	16.000
LAW	6115	Civil Procedure 1	4.00	4.00	98	16.000
LAW	6125	Justc Dmrcy Law	2.00	2.00	S	0.000
LAW	6127	Criminal Law	4.00	4.00	95	16.000

			GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	14.00	16.00	56.000
Cum GPA	4.000	Cum Totals	14.00	16.00	56.000

CUMULATIVE NUMERICAL AVERAGE: 95.4

Spring 2022 Semester

Program: Law School
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	6106	Law 2	3.00	3.00	97	12.000
LAW	6112	Property	4.00	4.00	89	13.200
LAW	6121	Contracts 1	4.00	4.00	100	16.000
LAW	6124	Leg & Reg	3.00	3.00	98	12.000

			GPA Hours	Earned	Points
Term GPA	3.800	Term Totals	14.00	14.00	53.200
Cum GPA	3.900	Cum Totals	28.00	30.00	109.200

CUMULATIVE NUMERICAL AVERAGE: 95.6
RANKED 8 (TIE) OF 175 AT THE END OF 2021-2022
DEAN'S SCHOLAR AWARD FOR TOP 15%
CALI AWARD FOR EXCELLENCE IN CONTRACTS I (RUB)

Summer 2022 Term

Program: Law School
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	8796	Study Foreign Inst	3.00	0.00	(IP)	0.000
LAW	8796	Study Foreign Inst	3.00	0.00	(IP)	0.000

			GPA Hours	Earned	Points
Term GPA	0.000	Term Totals	0.00	0.00	0.000
Cum GPA	3.900	Cum Totals	28.00	30.00	109.200

Autumn 2022 Semester

Program: Law School
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	6118	Constitutional Law	4.00	0.00	(IP)	0.000
LAW	7003	Appellate Advocacy	2.00	0.00	(IP)	0.000
LAW	7200	Business Assoc	4.00	0.00	(IP)	0.000
LAW	7503	First Amendment	3.00	0.00	(IP)	0.000
LAW	8896.52	Sem: US Sup Ct Dec	2.00	0.00	(IP)	0.000

			GPA Hours	Earned	Points
Term GPA	0.000	Term Totals	0.00	0.00	0.000
Cum GPA	3.900	Cum Totals	28.00	30.00	109.200

Spring 2023 Semester

Program: Law School
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	7403	White Collar Crime	2.00	0.00	(IP)	0.000
LAW	7406	Crim Pro Investiga	3.00	0.00	(IP)	0.000
LAW	7409	Crim Pro Adjudica	3.00	0.00	(IP)	0.000
LAW	8200	Evidence	4.00	0.00	(IP)	0.000
LAW	8896.02	Sem:Supreme Ct Lit	2.00	0.00	(IP)	0.000

			GPA Hours	Earned	Points
Term GPA	0.000	Term Totals	0.00	0.00	0.000
Cum GPA	3.900	Cum Totals	28.00	30.00	109.200

Law Career Totals

Cum GPA:	3.900	Cum Totals	28.00	30.00	109.200

End of LawTranscript

THE OHIO STATE UNIVERSITY

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STUDENT ACADEMIC SERVICES BUILDING, 5TH FLOOR
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COLUMBUS, OH 43210-1132
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EMAIL: REGISTRAR@OSU.EDU

TRANSCRIPT KEY

RELEASE OF INFORMATION

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ACCREDITATION

The Ohio State University (Columbus, Lima, Mansfield, Marion, Newark and the Agricultural Technical Institute, Wooster, Ohio) is accredited by the Higher Learning Commission as a degree-granting institution at the associate, baccalaureate, masters, professional and doctoral levels.

DETAILED TRANSCRIPT KEY

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A-	• Excellent....3.7 Pts	IP	• In Progress....0 Pts
B+	• Above Average....3.3 Pts	IX	• Extension of Incomplete....0 Pts
B	• Above Average....3.0 Pts	P	• Progress....0 Pts
B-	• Above Average....2.7 Pts	PA	• Pass....0 Pts
C+	• Average....2.3 Pts	PE	• Emergency Pass....0 Pts
C	• Average....2.0 Pts	NP	• Non-pass....0 Pts
C-	• Average....1.7 Pts	R	• Registered to Audit....0 Pts
D+	• Poor....1.3 Pts	S	• Satisfactory....0 Pts
D	• Poor....1.0 Pts	U	• Unsatisfactory....0 Pts
E	• Failure.... 0 Pts	W	• Withdrew....0 Pts
EM	• Examination Credit.... 0 Pts	NG	• Grade unreported by instructor....0 Pts
EN	• Failure-Non Attendance.... 0 Pts	NEN	• EN grade for PA/NP course....0 Pts
K	• Transferred Credit.... 0 Pts	UEN	• EN grade for S/U course....0 Pts

notation denotes a course involved in the forgiveness or substitution of grades - see Recalculation of Grades

SPECIAL COURSE NUMBER NOTATIONS

E suffix	Honors embedded course
H suffix	Honors course or honors version of a course
S suffix	Service Learning course
T suffix	Technical course (part of a two year technical program)

RECALCULATION OF GRADES

FORGIVENESS OR SUBSTITUTION OF GRADES: Students may petition their enrollment unit to repeat a course, and after completing the course the second time, have the original course credit and grade excluded from the calculation of the student's cumulative point-hour ratio, but remain on the student's official permanent record. The course or courses being substituted or repeated will bear the symbol "#" to the left of the grade.

PERMITTED TO RESTART GPA or FRESH START: An undergraduate student who enrolls in the university after an absence of five or more years may petition to have their GPA recalculated. If the petition is approved, the student resumes their academic program with no cumulative GPA. All courses taken will remain on the permanent record.

CALENDAR

- The semester system replaced the quarter system for the university in summer 2012
- The semester system replaced the quarter system for the College of Law in autumn 1984

UNIVERSITY CLASS RANKING SYSTEM

Student rank in all undergraduate colleges is based on total credit hours completed and recorded. Graduate students are not ranked. Professional students are ranked according to progress within their curriculum.

Semester Calendar				Quarter Calendar			
Rank	**Earned Hours**			**Rank**	**Earned Hours**		
Freshman	0	through	29	Freshman	0	through	44
Sophomore	30	through	59	Sophomore	45	through	89
Junior	60	through	89	Junior	90	through	134
Senior	90	and up		Senior	135	and up	

COURSE NUMBERING SYSTEM

SEMESTER CALENDAR

1000-1099	UG (Undergraduate) - Non Credit Courses Non-credit courses for orientation, remedial, or other non-college-level experiences. These are courses in addition to a program's graduation requirements.
1100-1999	UG - Introductory Level Undergraduate Courses Basic courses providing undergraduate credit, but not to be counted toward major or field of specialization in any department. Courses at this level are beginning courses, required or elective courses that may be a prerequisite to other courses.
2000-2999	UG - Intermediate Level Undergraduate Courses Intermediate courses providing undergraduate credit and may be counted toward a major or field of specialization.
3000-3999	UG - Upper Level Undergraduate Courses Upper Level courses providing undergraduate credit that may be counted toward a major or field of specialization.
4000-4999	UG - Advanced Level Undergraduate Courses Advanced Level courses providing undergraduate credit that may be counted toward a major or field of specialization. Graduate students may enroll in and receive graduate credit for 4000-level courses outside their own graduate program.
5000-5999	UG and G (Graduate) - Dual Career Level Courses Courses that are regularly offered for both graduate credit and undergraduate credit. Advanced Level courses providing undergraduate credit that may be counted toward a major or field of specialization. Foundational coursework and research providing graduate or professional credit.
6000-6999	G - Foundational Level Graduate and Professional Courses Foundational courses and research providing graduate or professional credit.
7000-7999	G - Intermediate Level Graduate and Professional Courses Intermediate courses and research providing graduate or professional credit.
8000-8999	G - Advanced Level Graduate and Professional Courses Advanced courses and research providing graduate or professional credit.

Quarter Calendar

000-099	Non-Credit Courses (except certain seminars and colloquia) for orientation, remedial, or other non-college-level experiences. Credit is not applicable to Graduation Requirements.
100-199	Basic Courses providing undergraduate Credit but not to be counted on a major or field of specialization in any department. Beginning Courses, Required, or Elective Courses that may be prerequisite to other courses.
200-299	Basic Courses providing Undergraduate Credit and may be counted on a major or field of specialization.
300-499	Intermediate Courses providing Undergraduate Credit or Basic Professional Credit that may be counted on a major or field of specialization.
500-599	Intermediate Courses providing Undergraduate or Professional Credit that may be counted on a major or field of specialization and may provide Graduate Credit only in other departments.
600-699	Courses providing Undergraduate or Professional Credit that may be counted on a major or field of specialization, and may provide Graduate Credit (in all departments).
700-799	Advanced Courses providing Undergraduate, Graduate, or Professional Credit.
800-999	Courses providing Graduate Credit and are open to undergraduates only with the approval of the Vice Provost for Research and Dean of the Graduate School.

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Re: Alex MacLennan, University of California Berkeley School of Law, Application for a Judicial Clerkship

Alex MacLennan (Alex) has applied for a judicial clerkship in your chambers and has asked me to write in support of his application. I do so with pleasure. I have great respect for Alex's intellect, his maturity, his demonstrated capacity for very hard work, his ability to engage constructively with all manner of legal and intellectual questions, and his general demeanor. Alex is extremely intelligent, capable, reliable, and self-sufficient. He will not wait passively to be told what to do but will rather take the initiative and launch into activity. He appreciates advice and direction but is not afraid of responsibility. I believe he is well fitted to take on the exacting position of a judicial clerk in your chambers.

Alex MacLennan is a 2018 graduate (B.Sc.) of the University of Cincinnati, where he earned a degree in Industrial Design, and was a Cincinnatus Scholar. Alex began his J.D. studies at the Ohio State University Moritz College of Law in the fall of 2021. He was a standout 1L student, ranking eighth in his class, with a near perfect GPA, winning particular recognition in Contracts. He transferred to Berkeley Law in fall semester 2022 and has continued to perform at a very high level, winning the Jurisprudence award (first in class) in Evidence, and several HH course grades – the highest grade we give.

I became acquainted with Alex in the fall of 2022, when he took my seminar in American Legal History. My seminar occupies a dual role in the Berkeley Law curriculum. It is open to J.D. students, but its primary function is to be a "foundation" seminar in the Law School's Ph.D. program in Jurisprudence & Social Policy (JSP). As such, it is taught as a graduate school reading and discussion seminar. Concretely we read and discuss a book each week, averaging 250-300 pages. Students are required to provide a short and informal written analysis of each week's book, as well as several formal "reaction" papers of c.1500 words apiece. Finally, they write a substantial final research paper (10,000 words). Alex was one of a dozen students in the class – an energetic mix of J.D. students, JSP graduate students, and History Department graduate enrollees. In a class full of very accomplished people, Alex wrote extremely thoughtful reaction papers (both formal and informal), made important contributions to class discussion, and turned in an excellent final paper, which had required very extensive research. His writing is both fluent and forceful. (I take excellence in writing very seriously and "edit" student work obsessively, as I do my own. Alex's writing required little of this attention.) His performance earned him an HH grade.

Alex's paper was entitled "No Quarter For Tyranny! A Third Amendment for the Twenty-First Century." His goal was to take one of least known, most historically specific, elements of the United States Constitution, and explore its significance and applicability to present day America. Notwithstanding its legal obscurity, Alex argued, the Third Amendment had been granted a future by the very tendency of constitutional law jurisprudence to emphasize historical originalism in searching for constitutional meaning, and by its willingness to reconsider long-standing precedent. No less important, given the replication of Third Amendment language in many state constitutions, is the tendency for state courts to take a more pronounced role in constitutional litigation.

Alex's paper faithfully charted the pre-history of the amendment in English law, in the American Revolution, and the reasons for its inclusion in the Bill of Rights. His real accomplishment, however, was to show the breadth of meaning of the "quartering" declared abhorrent in the late eighteenth century, and the breadth of use of "troops" at that same time. Together, these contemporary meanings registered deep grievance with the presence of militarized force among, and its use to control, the general populace. These eighteenth-century meanings convey real constitutional protection against much of the activity that we would today associate with militarized expressions of policing. As well, Alex showed how the Third Amendment was intended to erect wide protections around a right to privacy distinct from and in addition to the Fifth Amendment's protection of ordinary property rights. As Joseph Story put it, the Third Amendment guaranteed "that a man's house shall be his own castle, privileged against all civil and military intrusion." What, Alex asks, is the current definition of "house," and of "intrusion"? What, indeed, is the significance of protections against compulsory "quartering" in a world in which governments seek to compel pregnancy? These are just a few of the issues that his paper canvasses as potential Third Amendment applications.

I was delighted by Alex's final paper, from which I learned a great deal. Simultaneously, I was greatly impressed by the research effort involved. The paper is very comprehensive, and very well written. It is highly imaginative, perhaps as such a paper necessarily must be, given that its purpose is to drag a seldom-discussed legal 'oddity' into the daylight of serious contemplation. It is written with a touch of humor, for the same reason, but only a touch. In our discussions of successive drafts Alex noted that he had first been attracted to the idea of a paper on the Third Amendment by its very quirkiness. My one substantive impact on the paper was to impress on Alex the importance of quickly leaving that quirkiness behind. One does not undertake serious research for laughs.

Alex's engagements in legal scholarship have extended far beyond the Third Amendment. I have mentioned his record of excellence as a student in Contracts and in Evidence. At Ohio State he participated in the 1L Moot Court competition. At Berkeley he has been deeply involved with the Berkeley Journal of International Law, and with the Berkeley Journal of Criminal Law, for which he will be Editor-in-Chief in the 2023-24 academic year. In summer 2022 he studied abroad in the University of Oxford Summer Law Program. Alex now aspires to bring that range of engagements to the work of a judicial clerk. He has already shown

himself deeply committed to what clerking requires – engagement with complex issues of law as they are argued, evaluated, and decided at the various levels of our court system. His credentials are excellent, confirmed in his academic record.

There are many reasons why law students wish to become judicial clerks. Some do so to advance a career in practice, some because they hope, eventually, to become judges themselves, some because clerking remains a qualification of fundamental importance if one wishes to pursue an academic career in law teaching. As I see it, Alex imagines himself as a practitioner, but his application for a clerkship arises principally from his desire to experience the practice of law at the point of decision, to understand law from the unique perspective of chambers, unavailable to the practitioner who has never clerked. There is real curiosity behind the desire to find out what law is like in that moment of decision. He writes, "I have yet to find an area of law that I do not find interesting … I don't know what type of law I want to practice but a clerkship would give me more opportunities feed the same sort of curiosity that led to me to law to begin with." Here is the wish to engage with law that Alex's personal statement on applying to transfer to Berkeley Law speaks of as with him from a very young age – a deep curiosity about how law works, about why it can seem at times internally inconsistent and yet remain overall authoritative and legitimate. A clerk in chambers, it seems to me, is in a position to be able to learn much about this side of law.

Alex MacLennan is an impressive young man. He has a vocation in law – he has found in law the answer to the intellectual curiosity that drives him onward as well as the means to support himself. He writes, without pretension or guile, "I have read a lot of economics, politics, and history but never saw a career path forward in any of those. I'm not good enough at math to be an economist, not charismatic enough to be a politician, and I didn't see a path where I could earn a reasonable living from history alone. But law has elements of each of these areas without the same downsides so going to law school was a natural move for me." This is frank honesty; it is pragmatism. It is the voice of someone who worked throughout the year, every year, to support himself whilst an undergraduate at the University of Cincinnati.

My own personal interactions with Alex have always been entirely positive. He is a decent person, who will work productively with a range of peers from very different backgrounds and with different life experiences. He is polite and professional in demeanor, and takes his responsibilities seriously. He is fundamentally good-humored, happy to listen to what others have to say before advancing his own observations and conclusions. In one-on-one interactions he is open, and lively – someone with whom it is a pleasure to interact.

I believe Alex MacLennan will add great value and bring great commitment to your chambers. I commend his candidacy to you, without reservation.

Sincerely

Christopher Tomlins

Elizabeth Josselyn Boalt Professor of Law (Jurisprudence & Social Policy), University of California Berkeley; and Affiliated Research Professor, American Bar Foundation, Chicago.

May 20, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to highly recommend Mr. Alex MacLennan for a position as your law clerk. Mr. MacLennan was a student in my Criminal Procedure: Investigations class and received an honors grade. Indeed, Mr. MacLennan has received superb grades throughout law school. He completed his first year of law school at Ohio State and his grades were stunning, placing him in the top five percent of his class. He transferred to Berkeley Law and every grade so far has been honors or high honors.

Mr. MacLennan was a very frequent participant in class discussions. His questions often asked things that I had never considered and reflected an extraordinary intellectual curiosity and depth of analysis. His comments were always incisive, on point, and original. They always advanced the discussion and often caused me to think about the material in a new way.

His grades and his class participation demonstrate exceptional intelligence, consistent hard work, and impressive original thinking. I have no doubt that he would do a great job as your law clerk. He is very conscientious, and he writes well. He enjoys talking about ideas and would be a wonderful addition to any chambers. He is always warm and kind and I know that he would be a pleasure to work with.

Sincerely,

Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@berkeley.edu

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CHAMBERS OF
EVELIO GRILLO
Judge
Department 21

CHAMBERS OF
EVELIO M. GRILLO
JUDGE
County Administration Building
1221 Oak Street
Oakland, CA 94612

June 5, 2023

To Whom it May Concern:

I write to recommend Alex MacLennan for a judicial clerkship in the trial or appellate courts of the federal and state courts. Alex is a student in my civil trial practice class at Berkeley Law. The civil trial practice class combines the teaching of practical trial skills and academic study in a clinical setting. The civil trial practice class has two components, case study and demonstrative practical skills. The case study component involves integrating academic coursework with case file materials in preparation for the practical component of the class. The practical component of the class involves the students preparing and demonstrating opening and closing statements and conducting of direct and cross-examination exercises in class before their peers. The curriculum is also designed to impart a working knowledge of the Federal Rules of Evidence as well as specific trial practice skills such as impeachment, jury selection and oral argument.

Alex is an exemplary student who is dedicated to the study of law and to his academics. I have found Alex to be a hardworking and insightful student who makes a positive contribution to the class. The quality of Alex's work is uniformly high and without question, creative and insightful. I am aware that while at Berkeley Law, Alex has participated in two journals of note and published blog articles in the *Berkeley Journal of International Law* and the *Berkeley Journal of Criminal Law*, as well a competing in the McBaine Honors Moot Court Competition, which also speaks to his commitment as a law student, and to the legal profession.

Please give Alex MacLennan strong consideration in your clerkship selection process.

Sincerely,

Evelio M. Grillo

ALEX MACLENNAN

5706 Chestnut Ridge Dr, Cincinnati, OH, 45230 • alex.maclennan@berkeley.edu • 513-535-9166

Writing Sample

The enclosed writing sample comes from my fall 2022 Law and History Foundation Seminar. The class paper offered wide flexibility providing me a chance to do what I had long wanted to do in law school – conduct in-depth research on the history, application, and policy of the Third Amendment to the Constitution.

Yes, this is the Amendment about the quartering of soldiers but there is far more to it than being a constitutional footnote. The Amendment enlightens the understanding of the founding era and has been referenced in case law to support important constitutional values.

The original paper spanned nearly sixty pages but has been edited to its current size for a more manageable writing sample. Of course, I would be happy to provide any or all the omitted parts upon request.

NO QUARTER FOR TYRANNY! A THIRD AMENDMENT FOR THE TWENTY-FIRST CENTURY

Alex MacLennan[*]

INTRODUCTION

When I first told my friend that I was writing a paper on the Third Amendment she had to clarify what the Amendment actually was.[1] She was a bright second-year student at one of the top law schools in the world, but those qualifications alone are not enough to rescue the Amendment from obscurity. Indeed, Harvard legal historian Morton Horwitz has noted that many of his colleagues "sheepishly asked [him] what the Third Amendment is" when he told them he would be speaking on the topic.[2] If the Bill of Rights were in a grade school gym class, it seems likely the Third Amendment would be the last kid picked.

This article argues that contrary to its residence in legal obscurity, the Third Amendment should be reinvigorated for the twenty-first century. Rather than dismissing the Amendment as an outdated relic of 1791, this article argues that it is particularly relevant in light of the Court's increasing turn toward originalist doctrine, its willingness to overrule long-standing precedent, and the potential shift in constitutional litigation to state courts.

Part I of this article explores the Amendment's historical origins, the concerns at the time of the framing, and the subsequent, albeit limited, case law. Not only is the history of the Amendment informative for constitutional interpretation, the Amendment has been cited in famous Court opinions and was the turning issue in a Second Circuit case.

Part II poses the question why we should care about the Third Amendment now, given it has never decided a Supreme Court case in its 231-year history. Put simply, the current Court is a Court unlike any other. Its jurisprudence is characterized by a rising tide of originalist philosophy, a correlated search for evidence in constitutional meaning at the time of the

[*] Alex MacLennan is a second-year J.D. candidate at the University of California, Berkeley, School of Law.

[1] "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

[2] Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991).

framing, and a willingness to depart from *stare decisis*. Furthermore, the Court's recent decisions are poised to open a new frontier in state constitutional litigation. And the Third Amendment has cousins in nearly all state constitutions, meaning state courts may consider interpretation of the Amendment to be persuasive in interpreting their own state constitutions. Finally, the Amendment could become the tool of a future Court. Today's justices may serve for decades but they will not serve forever. If a new Court shifts ideologically, the new justices might apply the principles of the Amendment broadly – either to give it proper effect in itself or to avoid directly overruling interpretations of other constitutional provisions.

Part III explores what a broad interpretation of the Third Amendment for the twenty-first century could look like. It does this by examining the unresolved issues of the Amendment, of which there are many, and concludes that the Amendment has relevance well beyond its current framing in case law. While recognizing that case law is rare, this part also evaluates proposals from other writers and introduces new ideas.

Part IV completes the analysis by addressing counterarguments to the claim that the Amendment should be reinvigorated for the twenty-first century. It acknowledges that raising a Third Amendment claim is likely a long-shot to win a case – at least for now. But it disputes claims of the Amendment's obsolescence and rejects a narrow textualist reading for a broad reading serving to illuminate our constitutional understanding.

Is the Third Amendment the most important part of the Constitution? No, it is not. But things need not be the most important to be important. For now, Third Amendment litigation makes the news for its oddity alone[3] and I am not holding my breath waiting for law schools to add "Third Amendment" to their course catalog. Nonetheless, the Amendment is a tool worth using for its value in interpreting the Constitution and for the broad principles it embodies.

I. THIRD AMENDMENT HISTORY: FROM A CHECK ON THE CROWN TO LIMITS ON MODERN POWER

[Sections A, B, and C cover the historical origins of the Third Amendment]

[3] Joe Patrice, *3 Notable Legal Stories from the Short Week*, ABOVE THE LAW (July 5, 2013, 5:39 PM), https://abovethelaw.com/2013/07/3-notable-legal-stories-from-the-short-week/2/ ("It's a bird, it's a plane, it's a Third Amendment case?").

D. Interpreting the Third Amendment: Case Law and Commentary from 1791 – 2022

Finding sufficient case law to fill a First Amendment or a Criminal Procedure[4] casebook is easy enough – the challenge is in keeping the book to a size that does not require a herculean task for law students carrying it. In contrast, the rarity of Third Amendment cases makes a Third Amendment casebook a different proposition and, perhaps, closer to a case-pamphlet. Of course, cases require controversy so the rarity of Third Amendment cases may indicate consensus on the soundness of the Amendment. Further, the lack of litigation may show the effectiveness of the Amendment in deterring infringements on rights before they occur.[5]

But while the Amendment has never decided a Supreme Court case, it has had minor parts in *Youngstown* and *Griswold*.[6] Further, lower courts have occasionally interpreted the Amendment in situations ranging from the important task of incorporation to some highly unusual cases.[7]

Yet, two key principles of the Amendment shine through despite the rarity of on-point litigation: The subservience of military power to civilian affairs and the protection of privacy with an emphasis on the home. Together, these are the recurring principles in Third Amendment case law and commentary and form the strongest foundation for future litigation.

1. From obscurity to the Supreme Court

Americans who thought their quartering days were over got a rude awakening when the United States went to war against Britain again in the War of 1812. Sequels are rarely better than the original and Americans once

[4] Criminal Procedure courses generally cover the Fourth, Fifth, and Sixth amendments. See generally DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATIONS (8th ed. 2021).

[5] Mikulski v. Centerior Energy Corp., 501. F.3d 555, 576 (6th Cir. 2007) (Daughtrey, J., dissenting) ("Especially in this time of seemingly unfettered governmental efforts to intrude into private realms, I would hope that the majority would not equate the "nearly nonexistent" litigation involving the Third Amendment with a lack of importance of the principles protected by that provision.") See JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 192-93 (2011) (discussing quote in Third Amendment analysis).

[6] Griswold, 381 U.S. 479, Youngstown, 343 U.S. at 644 (Jackson, J, concurring).

[7] Engblom v. Carey, 677 F.2d 957 (2d. Cir. 1982) (incorporation to the states), Jones v. United State Dept. of Defense, 346 F. Supp. 97 (D. Minn. 1972) (Third Amendment challenge regarding soldiers marching in parade).

again endured forced quartering as shown by private compensation acts.[8] Prof. Bell also notes that, while the Mexican-American War raised the possibility of quartering, his analysis found no potential Third Amendment violations[9]

a. Antebellum analysis

The lack of nineteenth-century case law should not be interpreted as meaning courts and writers ignored the evils of quartering. In one example, a Louisiana court noted "[t]he quartering of troops in their dwellings without their consent" as an evil endured by the inhabitants of a foreign country in a case at issue.[10] Still, cases dealing with such issues were rarely before courts.[11]

While the nineteenth-century courts rarely examined the Third Amendment, it did receive occasional mention from legal writers. The most notable is in Chief Justice Joseph Story's *Commentaries* where he said the "provision speaks for itself" and that it secures "… the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[12] Other writers of the time wrote on how it protected "the comfort of the citizens"[13] and how it protected the house against military intrusion as the common law protected against civil intrusion.[14]

Writers also cited the Amendment for limiting abuses of the sword and actions by the commander-in-chief, even in wartime.[15] Francis Lieber used the Amendment as part of a larger criticism of military power in standing armies and advocated as small a standing army as possible.[16] And Lieber supported ultimate control by the civil power – a group Lieber claims military

[8] Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WILLIAM AND MARY BILL OF RTS. J. 117, 137 (1993).

[9] *Id.* Professor Bell partially credits this lack of Third Amendment violations to the conflict taking place in sparsely populated areas and on foreign soil.

[10] In re Charge to Grand Jury, 30 F.Cas 1023 (La. Cir. Ct. 1859).

[11] But see Brigham v. Edmunds, 7 Gray 359 (Mass. 1856) (rejecting quartering claim under Massachusetts state constitution as soldiers were not in house but instead in field).

[12] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 608 (Lawbook Exchange Ltd. 2d ed. 2005) (1851).

[13] BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN WITH A COMMENTARY ON STATE AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 179 (1832).

[14] TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 165 (3d ed. 1855).

[15] *Id.* and OLIVER, *supra* note 13.

[16] FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 116-123 (1859).

officers dubbed "babbling lawyers."[17]

b. The Civil War, Reconstruction, and the Third Amendment

Of course, the largest American conflict of the nineteenth-century was the Civil War where quartering did take place[18] despite the Third Amendment and a copycat provision in the Confederate Constitution.[19] Although the amounts were never paid, the Committee on War-Claims estimated that compensation for rent and damages from Civil War quartering would have amounted to "very many millions."[20]

Professor Bell makes a convincing argument that this quartering violated the Third Amendment whether a state of war existed or not.[21] He notes that if there were no state of war, the quartering violated the first clause of the Amendment barring quartering in peacetime.[22] And even if a state of war did exist, Congress had not provided for quartering by law, thereby violating the Amendment's second clause.[23] Bell sees "reading the Third Amendment to leave a gap between peace and war wide enough for the Executive to order the quartering of troops during times of unrest" as the only viable way to see the Amendment as not violated.[24] He also mentions the ignorance-of-the-law possibility but makes a compelling argument that this would amount to "disregarding an entire portion of the Bill of Rights."[25]

The Third Amendment was briefly mentioned by the Supreme Court in the aftermath of the Civil War, but not in cases about remedies for quartering. Instead, the Amendment was cited in *Ex Parte Milligan* for the proposition that "…no limitations were put upon the war-making and war-conducting powers of Congress and the President…" except for the Amendment itself.[26]

So, was the Third Amendment already doomed to be ignored in law and the political process? Hardly, answered Congress during Reconstruction. These years sought such an expansion of rights and restructuring of the

[17] *Id.* at 120.
[18] Bell, *supra* note 8 at 138.
[19] CONSTITUTION OF THE CONFEDERATE STATES March 11, 1861, art. 1, § 9, para. 14.
[20] Bell, *supra* note 8 at 138-39.
[21] *Id.* at 139.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 140.
[25] *Id.*
[26] Ex parte Milligan, 71 U.S. 2, 20-22 (1866). Contra Youngstown, 343 U.S. at 644 (Jackson, J., concurring).

country that some historians have come to refer to it as the "Second Founding."[27] And the Third Amendment was no exception.

As part of the discussion, constitutional law professor Chester James Antieau noted the discussion of the Third Amendment during the debates on how the Fourteenth Amendment would apply to the states:

> The distinguished Senator Jacob M. Howard of Michigan, who brought forward the proposed Amendment to the Senate floor, stated there on May 23, 1866, that the provisions and principles contained in the first eight Amendments to the Constitution would by the Fourteenth Amendment become binding upon the States. He then specifically included "the right to be exempt from the quartering of soldiers in a house without the consent of the owner." Comparable proof was provided in the House of Representatives by Representative John Bingham of Ohio, draftsman of the first section of the Fourteenth Amendment. When Bingham spoke in Congress in 1871, he recalled that among the fundamental rights intended to be safeguarded for all Americans against State abridgment, by the Fourteenth Amendment was a right to the "inviolability of their homes in time of peace, in that no soldier should be quartered in any house without the consent of the owner.[28]

Antieau noted that even opponents of the Fourteenth Amendment specifically mentioned that it would directly apply the Third Amendment's quartering restrictions to the states.[29]

c. The long slumber

Yet, even as other parts of the Bill of Rights began to decide cases in the late nineteenth and early twentieth centuries,[30] the Third Amendment remained a rare presence in the courts. This is not to say commentary on the Amendment dried up - it still played an ancillary role in constitutional law

[27] See generally ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2020).

[28] CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 118 (1997).

[29] *Id*. at 119.

[30] See Herndon v. Lowrey, 301 U.S. 242 (1937) (reversing conviction of communist party organizer on First Amendment grounds, Gitlow v. New York 268 U.S. 652 (1927) (applying First Amendment to the states), Bram v. United States, 168 U.S. 532 (1897) (Fifth Amendment privilege in federal criminal trials), Boyd v. United States, 116 U.S. 616 (1886) (Fourth Amendment violation by federal government).

books.[31] Perhaps the highest profile writing on the Third Amendment in the era came from Judge Thomas M. Cooley's *Constitutional Limitations*. There, he wrote that "[i]t is difficult to imagine a more terrible engine of oppression than the power of the executive to fill the house of an obnoxious person with a company of soldiers…"[32] and that the Amendment is "…but a branch of the constitutional principle, that the military shall in time of peace be in strict subordination to the civil power."[33]

The Third Amendment even appeared in discussion of law beyond American borders. Law professor Raleigh C. Minor mentioned restrictions on quartering of soldiers as one of the rights under his proposed federal league of nations.[34] His rationale focused heavily on the imposition of unequal burdens but also made mention that quartering had the effect of "very seriously impairing and interfering with the privacy and freedom of the home."[35]

World War II created one more path for Third Amendment litigation, but it was one not taken. In 1942, the United States government, fearing Japanese invasion, forced Alaska natives from their homes in the Aleutian Islands.[36] During the forced removal, the US government not only quartered soldiers in the natives' homes but also destroyed personal property of the natives and even razed entire villages.[37] But, no Third Amendment litigation came of the government actions and its likelihood of success would have been questionable given this was not exactly a time of racial enlightenment.[38] The

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[31] See HENRY FLANDERS, EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 239 (3rd ed. 1881), PLATT POTTER, GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 526 (1871), JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394-95 (1867).

[32] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 435 (7th ed. 1903).

[33] *Id.* at 435-36.

[34] RALEIGH C. MINOR, A REPUBLIC OF NATIONS: A STUDY OF THE ORGANIZATION OF A FEDERAL LEAGUE OF NATIONS 173 (Lawbook Exchange Ltd. 2005) (1918).

[35] *Id.*

[36] Tom W. Bell, *Property in the Constitution: The View From the Third Amendment*, 20 WILLIAM & MARY BILL OF RTS. J. 1243 (2012).

[37] *Id.* at 1243-44.

[38] See generally Korematsu v. United States, 323 U.S. 214 (1944) (effectively upholding Japanese internment during World War II). The case has been highly criticized and was repudiated by Chief Justice John Roberts' majority opinion in Trump v. Hawaii, 138 S. Ct 2392, 2423 (("Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (citing Korematsu, 323 U.S. at 248) (Jackson, J., dissenting)).

Third Amendment would have to continue waiting to be directly applied by federal courts.

d. To the federal courts

The privacy principle of the Third Amendment earned it a tangential mention in 1937. In *Wallace v. Ford*, plaintiffs asked the court to grant an injunction to restrict officers acting under a state liquor law.[39] The court engaged in a discussion of the Third Amendment.[40] After briefly discussing the Amendment's history, the court noted that "[t]here is something in the soul of the free man that resents any sort of espionage."[41] Although the plaintiffs lost their injunction on other grounds, the court provided one of the earliest opinions using the Third Amendment in support of privacy.

The Amendment would get some redemption at the Supreme Court in 1952, but its 1951 appearance in federal court was more embarrassing than anything else. The defendant in *United States v. Valenzuela* sought to challenge a rent control act and argued that it created "the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III of the United States Constitution."[42] It is not recorded whether the judge found it amusing but it is recorded that he found it without merit.[43] Nonetheless, the case lives on as the founding father of the absurd branch of Third Amendment progeny.[44]

Valenzuela gave the Third Amendment a silly role, but *Youngstown* gave it a serious one. Commonly known as the *Steel Seizure Case*, the Court ruled against President Harry Truman's seizures of steel mills during the Korean War in a highly fractured decision.[45] Justice Jackson's concurring opinion saw the Constitution as establishing limits on the domestic power of the Commander-in-Chief, even in wartime.[46] Among the limits that Jackson cited in his reasoning was the Third Amendment which has the effect that "even in

[39] Wallace v. Ford, 21 F. Supp. 624 (N.D. Tex. 1937).
[40] *Id.* at 627.
[41] *Id.*
[42] United States v. Valenzuela, 95 F. Supp 363, 366 (S.D. Cal. 1951).
[43] *Id.*
[44] See below "The strange, funny, and frivolous."
[45] Youngstown, 343 U.S. 579.
[46] *Id.* at 634-56. See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 207 (2d ed. 1994) (noting that "Jackson disavowed any intent to circumscribe or contract the constitutional role of the President as Commander in Chief" and Jackson was primarily concerned about executive power turning inward for a lawful economic struggle).

war time, [the Commander-in-Chief's] seizure of needed military housing must be authorized by Congress."[47] While not quite the same as the penumbras theory articulated by Justice Douglas in the coming years, it was a significant move toward recognizing the Third Amendment as conveying a broader principle rather than a narrow limitation – a growing theme in the coming years.[48]

The privacy principle of the Third Amendment began to emerge from its chrysalis in Douglas' dissent in *Poe v. Ullman*.[49] The case involved Connecticut's anti-contraception law – an issue Douglas would eagerly return to just a few years later.[50] For now though, Douglas dissented as the majority under Justice Felix Frankfurter refused the request for a declaratory judgment against the law on standing grounds.[51] In his forty-five page dissent, Douglas made clear his willingness to find the law unconstitutional on privacy grounds.[52] And among the evidence supporting his view of privacy as part of liberty was the Third Amendment.[53]

But Douglas got his revenge on the Connecticut anti-contraception law four years later in *Griswold v. Connecticut*.[54] In between the cases, Justice Frankfurter had retired and been replaced by liberal Justice Abe Fortas ushering in the high tide of the Warren Court.[55] Douglas' lengthy dissent in *Poe* made him the natural choice to write the *Griswold* opinion but Douglas' "checkered marital history and extramarital dalliances" may have also played a role.[56]

The *Griswold* opinion read in constitutional law classes across the United States today is quite unlike the "five-page, double-spaced opinion that offered the narrowest possible grounds on which to strike down the law."[57] The

[47] *Id.* at 644.

[48] Cf. Ex parte Milligan, 71 U.S. 2, 20-22. Milligan saw the Third Amendment as an exclusive limitation on executive power whereas Jackson's Youngstown concurrence reversed this viewing the Amendment as part of a broader principle.

[49] 367 U.S. 497 (1961).

[50] Griswold, 381 U.S. 479.

[51] Poe, 397 U.S. 497.

[52] *Id.* at 509-55.

[53] *Id.* at 549.

[54] Griswold, 381 U.S. 479.

[55] BRUCE ALLEN MURPHY, WILD BILL: THE LIFE AND LEGEND OF WILLIAM O. DOUGLAS 360-61 (2003). This is not to say Douglas was happy to see Frankfurter's health force him to leave. Douglas penned a note wishing him well and adding that "[t]he conferences are *not* shorter by reason of your absence!!" *Id.*

[56] *Id.* at 384.

[57] *Id.*

original draft sought to bring the spousal relationship within the right of association in the First Amendment and only after the prodding of Justice William Brennan and Brennan's law clerk did Douglas' opinion expand to include the penumbras known today.[58]

By developing the penumbras, Douglas gave the Third Amendment its greatest enunciation of the privacy principle. In *Griswold*, Douglas wrote of the Third Amendment as one of the "[v]arious guarantees [that] create zones of privacy."[59] There, he saw the Third Amendment as "another facet of that privacy."[60] However, Douglas only mentioned the Third Amendment once and even then, only as one supporting factor in his penumbral analysis.[61] Nonetheless, *Griswold* has gone on to be the preeminent case cited to today for the Third Amendment's privacy principle.

The Third Amendment received a couple more shout-outs by the Court in the next several years. It was cited in a footnote in the landmark *Katz v. United States* decision for the rule that it protects an aspect of privacy by preventing the peacetime quartering of soldiers.[62] Yet, it received a greater part in *Laird v. Tatum* where the Amendment's prohibitions were cited for "their philosophical underpinnings [which] explain our traditional insistence on limitations on military operations in peacetime."[63] The Court went on to note that:

> "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."[64]

These instances notwithstanding, the Supreme Court would rarely mention the Third Amendment and wholly refrained from deciding a case on a Third Amendment basis. It was the Second Circuit Court of Appeals that would

[58] *Id.* at 384-87. Brennan later said of Douglas that his "last ten years on the Court were marked by the slovenliness of his writing and the mistakes that he constantly made." *Id.* at 386.
[59] Griswold, 381 U.S. at 484.
[60] *Id.*
[61] *Id.*
[62] Katz v. United States, 389 U.S. 347 n.5 (1967).
[63] 408 U.S. 1, 15 (1972).
[64] *Id.* at 15-16.

decide the most important case in Third Amendment history.

2. The Second Circuit makes history

If a law professor wanted to throw students a curveball, a Third Amendment hypo would be a good start. But where would such a hypo ever be found in real life? The Second Circuit has the answer.

The case is *Engblom v. Carey*[65] and it is the highest authority on the Third Amendment to-date. The court noted it was the first time that a federal court would give an opinion on the literal interpretation of the Third Amendment.[66] This earns the case a mention in any complete modern Third Amendment analysis, and its own Wikipedia article as well[67] – potentially influential given the reliance by certain judges on Wikipedia.[68] If constitutional law has *Marbury*,[69] Third Amendment law has *Engblom*.

The case arose from events surrounding a strike by New York prison officers. The striking officers resided on the grounds of the prison facility, had money deducted from their salaries for monthly rent, and were directed to maintain their rooms "in accordance with normal 'landlord-tenant' responsibilities and practices."[70]

After a statewide strike of prison officers began, Governor Hugh Carey activated the National Guard and housed them in the prison officials' rooms.[71] When the strike ended after a few weeks, plaintiffs were denied a return to their rooms. They sued under the Third Amendment and Fourteenth Amendment due process.[72]

Engblom quickly dealt with the issue of incorporation to the states, holding that the Third Amendment is incorporated.[73] The court cited

[65] 677 F.2d 957.

[66] Engblom, 677 F.2d 959; *id*. at n.1.

[67] ENGBLOM V. CAREY, https://en.wikipedia.org/wiki/Engblom_v._Carey (last visited Nov. 4, 2022).

[68] Will Knight, *Wikipedia Articles Sway Some Legal Judgments*, WIRED (Aug. 2, 2022, 4:29 PM), https://www.wired.com/story/wikipedia-articles-sway-some-legal-judgments/.

[69] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[70] *Id*. at 960.

[71] *Id*.

[72] The district court dismissed both claims on summary judgment. *Id*. Engblom reversed on the Third Amendment claim but affirmed on the due process claim. *Id*. at 959.

[73] *Id*. at 961. The district court had also held the Third Amendment was incorporated. *Id*.

Griswold and held the Third Amendment is a fundamental right "implicit in the concept of ordered liberty."[74]

Next, the Second Circuit disagreed with the district court about the scope of property rights recognized in the Third Amendment. The court acknowledged that "[u]nder a technical and literal reading of the language, the Third Amendment would only protect fee simple owners of houses," but rejected this view in favor of a broader reading similar to analogous contexts.[75]

The court then held that "[t]he Third Amendment was designed to assure a fundamental right to privacy," once again citing *Griswold*.[76] The court looked to analogous contexts in the Fourth Amendment and noted how the Supreme Court had rejected common law property ownership as a requirement for a legitimate expectation of privacy under the Fourth Amendment.[77] The court went on to point out that it would be anomalous to grant individuals protection against unreasonable searches and seizures while allowing soldiers to be quartered in their houses.[78] Finally, the court held that fee simple ownership was not a requirement for Third Amendment protection and that protected interests "extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[79]

The court reversed the district court's summary judgment on the grounds that the facts did "…not preclude a finding that [the plaintiffs] had a substantial tenancy interest in their staff housing, and that they enjoyed significant privacy due to their right to exclude others from what were functionally their homes."[80]

Unfortunately for the plaintiffs, this was not enough to prevail on their Third Amendment claim. On remand, the district court held that qualified immunity applied since the plaintiffs' Third Amendment rights were not clearly established at the time.[81] And the Second Circuit affirmed on appeal ending the leading Third Amendment case.[82]

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[74] *Id.* (quoting Griswold, 381 U.S. at 499).
[75] *Id.* at 962.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 964.
[81] Engblom v. Carey, 572 F. Supp. 44 (S.D.N.Y. 1983).
[82] Engblom v. Carey, 724 F.2d 28 (2d. Cir.1983).

Despite the plaintiffs' loss on qualified immunity grounds, *Engblom*[83] made Third Amendment history. It is the case to cite for the proposition that the Third Amendment is incorporated to the states and that the term "soldiers" under the Amendment applies to more than just the United States military.[84] Additionally, *Engblom* directly set forth the privacy principle of the Third Amendment and gave it a scope similar to the Fourth Amendment, which is cited for that as well.[85]

3. A modern mixed bag of case law

The Third Amendment has not seen any cases as authoritative and on-point since *Engblom*.[86] However, once awoken from its slumber the Amendment has refused to go back to bed. It has featured in cases that have tested its limits and has seen its principles of privacy and limits on military power cited in even more cases. It has also made guest appearances in numerous frivolous suits, which are as amusing as they are ridiculous.

a. Testing the Third Amendment's limits

On-point Third Amendment cases are the solar eclipses of case law – they rarely occur, attract attention when they do, and should be viewed through a proper lens. In *Estate of Bennett v. Wainwright*, a federal district court addressed the plaintiffs' claim of "illegal quartering" but dismissed it on the grounds that "[t]here is no sense in which a single state trooper and several deputy sheriffs can be considered "soldiers" within the meaning of that word as it is used in the amendment…"[87] Thus, the court did not see the Amendment as applicable to ordinary police but did not indicate what forms of policing may rise to inclusion within the Amendment.

Mitchell v. City of Henderson,[88] picked up the Third Amendment baton

[83] Engblom, 677 F.2d 959.

[84] McDonald v. City of Chicago, 561 U.S. 742 n.13 (2010) (citing Engblom in discussing whether Third Amendment is incorporated but not deciding the issue), Nika Corp. v. Kansas City, 582 F. Supp. 343 n.2 (W.D. Mo. 1983) (citing Engblom in writing "In addition, although the Supreme Court has never addressed the issue, it would seem reasonably clear that the rights guaranteed under the Third Amendment would also be included in this category [of incorporation]"), Mitchell, 2015 WL 427835 at *17 (citing Engblom for Third Amendment incorporation, scope of "soldier," and privacy principle).

[85] Mitchell, 2015 WL 427835 at *17 (citing Engblom for privacy principle).

[86] Engblom, 677 F.2d 959.

[87] 2007 WL 1576744 at *7.

[88] 2015 WL 427835.

in 2015 and is the closest Third Amendment examination since *Engblom*. In *Mitchell*, the plaintiffs alleged, among other claims, that police violated the Third Amendment when they forcibly entered his house, "…swarmed through ... [his] home ..., searching through his rooms and possessions and moving his furniture, without permission or a warrant, and then subsequently occupied it and used it as an observation post to surveil [another person's] house."[89] The plaintiffs alleged "that the approximately nine hours of police occupancy in this case amounts to quartering."[90]

The *Mitchell* court rejected the plaintiffs' Third Amendment claim while engaging in some significant Third Amendment analysis. It cited *Estate of Bennett* while stating that "a municipal police officer is not a soldier for purposes of the Third Amendment."[91] The court supported its reasoning by stating that it was "…not a military intrusion into a private home, and thus the intrusion is more effectively protected by the Fourth Amendment."[92] Furthermore, while the court explicitly did not decide the issue of whether a nine-hour occupation would amount to quartering, it noted in dicta that it would suspect not.[93]

But there was more to the court's Third Amendment analysis. First, the court accepted the Third Amendment's property-based privacy principle citing *Griswold* and *Engblom*.[94] Second, the court noted that the Amendment provides restrictions on "…incursion by the military into their property interests, and guarantees the military's subordinate role to civil authority."[95] And third, it appeared to accept the incorporation of the Amendment in its favorable citation of *Engblom*.[96] In sum, despite ultimately rejecting the Third Amendment claim, the *Mitchell* court affirmed both the Amendment's privacy principle and its principle for civilian control over the military.

Going beyond *Mitchell*, the Third Amendment has been raised in a few more tangential ways. In *Custer County Action Ass'n. v. Garvey*,[97] the Tenth Circuit addressed a claim by plaintiffs that military flights over their land violated the Third Amendment. While the court cited *Engblom* favorably, it found it "borders on frivolous" to argue that flights in regulated, lawful

[89] *Id.* at *3.
[90] *Id.* at *17.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at *17-18.
[97] 256 F.3d 1024 (10th Cir. 2001).

airspace violate the Third Amendment.[98] Additionally, the court cited Fourth and Fifth Amendment principles showing a possible willingness to use them in interpreting the Third Amendment.[99]

In *Johnson v. United States*, a federal district court faced a Third Amendment claim and issued a decision swimming in aquatic puns.[100] The plaintiffs presented an interesting Third Amendment argument based on allegations that the United States military unlawfully quartered chemicals on the plaintiffs' property.[101] The court was, therefore, given a unique opportunity to decide on whether to take a broad reading of "soldier" to include other military activities as well as examining the property rights aspect and relation to the Fifth Amendment. But even though plaintiffs invited the court to "eat the first shrimp," the court ruled against plaintiffs on procedural grounds.[102] The Third Amendment claim was left unanalyzed creating a free hypo for law professors but leaving Third Amendment researchers lost at sea.

b. Affirming Third Amendment policies

Cases referencing the Third Amendment for its underlying principles are – not surprisingly – far more common than cases literally applying the Amendment. But the most common principles – privacy and limiting military power – are powerful and have been cited in numerous cases.

The D.C. Circuit spoke of the Third Amendment in broad terms regarding military activities in *Ramirez de Arellano v. Weinberger*.[103] Although the case involved allegations of actual soldiers on plaintiffs' property, the court broadly discussed the Third Amendment in a footnote saying "[t]he spirit of the Nation's historic commitment to protecting private citizens' rights against

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[98] *Id*. at 1043.

[99] *Id*. at 1043-44.

[100] 238 F.R.D. 199, 200 (W.D. Tex. 2006) ("Though plaintiffs' counsel makes a whale of an argument, the appellate sharks may find it fishy if an Article III federal trial court were to crawfish on its obligation to follow Congressional intent and the Article III judicial chain of command, absent a proper precedential hook. Plaintiffs want this Court to abandon its Article III ship and take up the oar of the Article I Court of Federal Claims Rules. Were the Court to take plaintiffs' bait, it would probably be reversible bottom feeding. Moreover, shrimp are said to be high in cholesterol and this Court prefers red herring, actual not metaphorical. For reasons anchored in legal, non-aquatic concepts, plaintiffs' motion for opt-in class certification is sunk.")

[101] *Id*. see also Johnson v. United States, 208 F.R.D. 148 (W.D. Tex. 2001) (previous case history of Johnson, 238 F.R.D. 199).

[102] *Id*.

[103] 745 F.2d 1500 n.186 (D.C. Cir. 1984).

military excesses is embodied in the third amendment's express prohibition against the quartering of soldiers in private homes."[104] Whether the court viewed the Third Amendment itself as prohibiting such "military excesses" is unclear, but by providing evidence of a "historic commitment," it found the Third Amendment might make itself valuable to a court looking for rights "deeply rooted in this Nation's history and tradition."[105]

The Second Circuit got another chance to develop its Third Amendment jurisprudence in *Padilla v. Rumsfeld*.[106] The court cited the Amendment as demonstrating the framers' belief about the sanctity of the home and the need to prevent military intrusion.[107] Further, the court held that the Third Amendment's grant of power to Congress rather than the President demonstrated that, absent congressional authorization, the President did not have the power to detain the plaintiff.[108]

In *El-Shifa Pharmaceutical Industries Co. v. United States*, the Federal Circuit addressed a case of enemy property designation by the president and briefly cited the Third Amendment.[109] While it was not applicable to the foreign property at issue, the court cited Jackson's *Youngstown* concurrence and reasoned the Third Amendment might support limitations on enemy designation of domestic property as part of limitations on domestic use of military power.[110]

In *United States v. Dreyer*, the Ninth Circuit referenced the Third Amendment as a constitutional underpinning of the Posse Comitatus Act.[111] The court further explained in a footnote citing *Laird v. Tatum* and its resistance to military intrusion into civilian affairs.[112] But the court appeared unfriendly to the idea of creating an exclusionary rule connected to the Third Amendment since it refused to apply the rule to violations of the Third Amendment underpinned Posse Comitatus Act.[113]

Even state courts have occasionally cited anti-quartering provisions

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[104] *Id*.
[105] Dobbs, 124 S. Ct. at 2242.
[106] 352 F.3d 695 (2d. Cir. 2003), rev'd on other grounds in Rumsfeld v. Padilla, 542 U.S. 426 (2004).
[107] *Id*. at 714-15.
[108] *Id*. at 715.
[109] 378 F.3d 1146, 1169-70 (Fed. Cir. 2004).
[110] *Id*. (citing Youngstown, 343 U.S. at 644 (Jackson, J., concurring).
[111] 804 F.3d 1266 (9th Cir. 2015).
[112] *Id*. at 1272 and n.7.
[113] *Id*. at 1278-80.

mirroring the Third Amendment in their state constitutions in support of a right to privacy. Although declining to reach the right to privacy in *Zaatari v. City of Austin*, the Texas Court of Appeals cited Article 25 of the Texas Constitution, a prohibition on quartering, as supportive of the right.[114]

c. The strange, funny, and frivolous

The strangeness of the Third Amendment in the modern world has also made it a tool that the unskilled love to wield in frivolous ways. There are plenty of examples of cases where no facts are alleged that even remotely touch on the Amendment, in which it seems the plaintiffs are throwing a bowl of constitutional spaghetti against the wall to see what sticks. Occasionally, judges have appeared annoyed by these uses of the Amendment such as the judge in *Watts v. Regions Financial Corp.* who lamented the "[t]he Sisyphean task of clearing the court's high-Wattage docket…".[115] There is no need to discuss these cases that fail to advance Third Amendment jurisprudence other than for entertainment value and to give a full picture of Third Amendment litigation.[116]

B. Third Amendment History and Case Law Summary

Third Amendment litigation is the Amur leopard of the legal world: Rare to find, beautiful to see, and most appreciated by those with knowledge of the subject. Courts and commentators have shown that the Amendment still has relevance today and they are wise to do so. The Third Amendment may typically be analyzed as a historical artifact, but artifacts can tell us a lot about who we are and what our country stands for. In the case of the Third Amendment, the historical record is clear in showing an affirmation of the principles of limiting military power and protecting privacy.

The case law and commentary since 1791 has repeatedly reaffirmed these principles showing the Amendment remains relevant today. In the words of Chief Justice Warren Burger:

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[114] 615 S.W. 3d. 172 n.9 (Tex. Ct. App. 2019).

[115] 2016 WL 4436318 at *1 (N.D. Ala. Aug. 23, 2016).

[116] Occasionally the Third Amendment has been mistaken for other amendments. See Marquette Cement Min. Co. v. Oglesby Coal Co., 253 Fed. 107 (N.D. Ill. 1918) ("Defendant's position is that the suit for injunction cannot be maintained because the remedy at law is adequate, and it is therefore entitled to a trial of the facts by a jury, under the third amendment to the federal Constitution"), Jerry Buchmeyer, *Pleading the Third*, 65 TEX. B.J. 93, 94 (2002) (story of individual invoking Third Amendment when the Fifth Amendment would be much more useful), and Bell, *supra* note 8 at 141 (discussing strange uses of Third Amendment).

> Though that danger [of British military power] is long past, the Third Amendment still embodies the same principles: that the military must be subject to civilian control, and that the government cannot intrude into private homes without good reason.[117]

It is important to keep these principles in mind when considering current Third Amendment issues and how to use the Amendment in our modern world.

[Parts II, III, and IV omitted]

CONCLUSION

The Third Amendment's reputation as the Constitution's "runt piglet" should not hold back its use in the twenty-first century – even runt piglets can achieve great things.[118] The history of quartering and the debates of the framers show that there is much more to the Third Amendment than keeping soldiers from physically lodging in Americans' homes.

The Court has a unique opportunity to use its originalist views to reinvigorate the Third Amendment as it did the Second. And in the absence of Supreme Court action, state courts should not sit on the sidelines. They too have quartering provisions in their state constitutions that they should bring to bear as state courts increasingly become constitutional battlegrounds.

The Third Amendment has been in existence for 231 years, and it has no expiration date. Its obscurity means there is no real movement for its repeal and constitutional inertia means there is no feasible way to repeal it anyway. Thus, it will remain part of our Constitution waiting for a future court to give voice to the framers' principles and "eat the first shrimp."[119]

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[117] Warren E. Burger, *Introduction* 6, *in* BURNHAM HOLMES, THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS: THE THIRD AMENDMENT (1991).
[118] See generally E.B. WHITE, CHARLOTTE'S WEB (1st ed. 1952).
[119] Johnson, 238 F.R.D. at 200.

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The Honorable Jamar K. Walker
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Dear Judge Walker:

I am a rising third-year student at New York University School of Law and Managing Editor for Development of the New York University Annual Survey of American Law. I am writing to apply for a 2024-2025 term clerkship in your chambers. I am particularly interested in clerking for you due to your background as an Assistant United States Attorney. As someone who aspires to become a federal prosecutor, I believe your mentorship will grant me invaluable insights into the decision-making processes and strategic considerations involved in criminal cases.

Enclosed please find my resume, law school transcript, and two writing samples. Also enclosed are letters of recommendation from Professor Katrina Wyman, Professor Farhang Heydari, and Ms. Shireen Farahani. I served as a research assistant for Professors Wyman and Heydari, and Ms. Farahani supervised my work at the New Jersey Attorney General's Office.

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

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Researched and prepared memorandums on property law doctrines. Topics included public accommodations law, the doctrine of ouster, and regulatory takings.

NEW JERSEY ATTORNEY GENERAL'S OFFICE, Newark, NJ
Summer Intern, Division of Law, June 2022 - August 2022
Conducted extensive legal research and writing for the Affirmative Civil Rights and Labor Enforcement group. Drafted memorandum on federal preemption of state labor laws.

PROFESSOR FARHANG HEYDARI, NYU SCHOOL OF LAW, New York, NY
Research Assistant, June 2022 - August 2022
Researched the constitutional implications of private surveillance. Drafted memorandum on the First Amendment right to gather information.

GOLDMAN SACHS, New York, NY
Compliance Technology Office Associate, January 2021 - August 2021; ***Analyst,*** July 2017 - January 2021
Guided project delivery and developed policies and governance for the engineering team within Goldman's Compliance Division. Designed and managed new policies and control standards for a data analytics platform used by compliance personnel to create high-risk workflows.

ADDITIONAL INFORMATION

Experience volunteer canvassing for political campaigns. Hobbies include acoustic guitar, watch collecting, and running.

Name: **Stephen Mageras**
Print Date: **06/01/2023**
Student ID: **N14689673**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Rachel E Barkow			
Torts	LAW-LW 11275	4.0	B
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	B
Instructor: Samuel Issacharoff			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	A-
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Emma M Kaufman			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Liam B Murphy			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Law and Society in China Seminar	LAW-LW 10871	2.0	A
Instructor: Ira Belkin, Katherine A Wilhelm			
Legislation and Political Theory	LAW-LW 11688	3.0	A-
Instructor: John A Ferejohn			
Income Taxation	LAW-LW 11994	4.0	B+
Instructor: Eric Zolt			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	B+
Instructor: Marcel Kahan			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Judicial Decision Making	LAW-LW 12250	4.0	A
Instructor: Barry E Friedman			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Katrina M Wyman			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	57.0	57.0

Staff Editor - Annual Survey of American Law 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 314F
New York, NY 10012-1099
Telephone: (212) 998-6033
Facsimile: (212) 995-4341
E-mail: katrina.wyman@nyu.edu

Katrina M. Wyman
Wilf Family Professor of Property Law
Director, Environmental and Energy Law LLM Program

«DateForLetter»

RE: «Student»

Your Honor:

I write to recommend Stephen Mageras for a clerkship.

Stephen earned an A- in my 1L Property class in the spring of 2022, based on the examination. Stephen worked for me in the spring of 2023 as a research assistant, researching and writing several memos on property law topics.

Before law school, Stephen graduated from Harvard University with a B.A. in Environmental Science & Public Policy, and a Secondary in Economics. For four years, he was an analyst and then an associate in the Compliance Division at Goldman Sachs in New York.

In addition to his course work at the law school, Stephen is involved with the Annual Survey of American Law, a student-edited journal. He was a staff editor as a 2L and is currently the Managing Editor for Development, a position for which he was selected by the Journal's board. In this role, Stephen reads and evaluates submissions to the Journal, and leads a team of editors in providing authors with feedback on their work. Stephen's extra-curricular activities also include being a student member of the Curriculum and Adjunct Appointments Faculty Committee. This is an important committee at the law school that vets the creation of new classes and the appointments of adjunct professors.

Based on the memos that Stephen did for me this spring, I can attest that he has excellent research and writing skills. The topics he researched included various legal issues about concurrent forms of ownership, such as joint tenancy and tenancy in common. For example, Stephen researched the concept of "ouster," attempting to distill from existing treatises and case law whether it is a cause of action, an element of a cause of action or something else. Stephen found that different sources assign different roles to ouster, jurisdictions likely vary in the role that they envisage for ouster, and that ouster generally plays a subtle role in property law. I was grateful for his attention to detail in his research for me, and the way that he dug into case law and secondary sources in an effort to help me better understand the topic of ouster. He took on the projects as his own, and pursued avenues of research beyond what I was expecting. Stephen and I spoke about his research, and I could tell that he enjoys thinking about unresolved issues in law, and contemplating the

legal implications of different ways of addressing these issues. Stephen also presented his work in a polished form and was responsive to questions and desirous of feedback, likely reflecting his pre-law school professional experience in the demanding environment of Goldman Sachs.

In sum, I urge you to consider Stephen for a clerkship. He wants to be a federal prosecutor, and is thinking that he will begin his career in practice with a private law firm and then transition to public service. Please let me know if I can be of help in the clerkship selection process.

Sincerely,

Katrina M. Wyman

NYU | LAW

FARHANG HEYDARI
Legal Director, Policing Project at NYU School of Law
Assistant Professor, Vanderbilt Law School, effective August 2023

NYU School of Law
110 West Third Street, Room M102
New York, NY 10012
P: 917 912 0596
farhang.heydari@nyu.edu

June 12, 2023

RE: Stephen Mageras, NYU Law '24

Your Honor:

I write this letter in strong support of Stephen Mageras' application to serve as your law clerk. During the time that I have known him, Stephen has demonstrated the ability to understand and integrate a substantial body of doctrine, to work well under deadlines, and to produce succinct and high quality work product. His analytical mind, strong research skills, maturity, and equanimity will be valued assets in chambers.

In Fall 2021, Stephen was one of twelve students enrolled in a voluntary reading group on policing technologies co-taught by myself and Professor Barry Friedman. The reading group exposed students to emerging issues around police use of advanced technologies, and encouraged them to engage with the complicated costs and benefits of these technologies. Relying on a wide range of source materials, students were asked to consider different governance approaches—Fourth Amendment litigation, federal- and state-level legislation, private self-governance, and more.

Among a group of talented students, Stephen was one of our best. Over the course of the semester, he was consistently prepared and brought a mature, nuanced perspective to the discussions. He displayed not only an interest in the subject matter, but a thoughtfulness and aptitude for the lawyering skills required. He meaningfully contributed to class discussions. His maturity was due, at least in part, to his pre-law school experience—he spent years working in the compliance division of Goldman Sachs, where he was promoted at the first opportunity.

The following summer, Stephen served as my research assistant. Although he was already working full time, Stephen was eager to gain more experience with legal research and writing. Knowing the quality of his work, I was eager for the help. I tasked Stephen with a complicated research task—the constitutional dimensions of private surveillance. There was no hornbook for Stephen to turn to for most of this work. He was required to understand both the technologies at play, as well as new bodies of constitutional doctrine (e.g., First Amendment). His work was consistently excellent. I have no question that he has the research skills of an excellent law clerk.

During law school, Stephen has demonstrated a strong commitment to service, while also to developing a breadth of experience. While at NYU, he has worked with the New Jersey

Attorney General, the law school’s Curriculum and Adjunct Appointments Faculty Committee, and the *Annual Survey of American Law* (a journal that focuses on publishing practitioner perspectives—not limited to one subject area). After clerking, he hopes to work as a federal prosecutor.

In short, I am confident that Stephen will be an excellent law clerk and will benefit tremendously from the experience. In addition to his legal skills and outstanding work ethic, Stephen is a pleasure to work with. He will make a wonderful addition to any chambers.

If you have any questions or concerns, please do not hesitate to reach out to me at 917.912.0596.

Sincerely,

Farhang Heydari

Farhang Heydari

State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box
TRENTON, NJ 08625-0

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

May 19, 2023

Your Honor:

I write to support Stephen Mageras's application as a judicial law clerk. I supervised Stephen's work on a substantial research memorandum when he interned with our Affirmative Civil Rights & Labor Enforcement section, which investigates civil rights, labor and workplace violations in New Jersey and brings appropriate actions to combat those violations.

Throughout his time with our office, I was impressed by Stephen's excellent legal research and writing skills, particularly his ability to clearly and succinctly summarize complicated legal standards. The matter on which I worked with him likewise had a lengthy procedural history; Stephen deftly distilled a years-long litigation history into a few sentences. As a testament to the strength of his legal writing, he produced a well-reasoned and easy-to-follow memo for a matter that involved myriad substantive and procedural issues. When a new attorney joined that matter after Stephen's internship concluded, his memo ultimately served as a resource to provide further background on the case.

Stephen also took direction well. He asked thoughtful questions to help guide his writing and not only readily incorporated feedback on his written work, but also took that feedback into consideration in his subsequent work product. I appreciated Stephen's diligence in cite-checking and making sure that each proposition, as well assertions about the background and timeline of the case, found adequate support in case law, statutes, and the record.

Stephen demonstrated enthusiasm in taking on challenging legal issues, produced thoroughly researched and reliable work product, and maintained cooperative relationships with deputies in the section, who were similarly impressed by his work for our office. One attorney noted: "Stephen is an excellent writer. He did good job of condensing and summarizing large amounts of case law." Another attorney noted: "Stephen was quick to raise his hand to take on assignments. He produced high-level research and spotted a related connected issue that was not on the team's radar."

HUGHES JUSTICE COMPLEX • TELEPHONE: (609) 826-6763 • EMAIL: shireen.farahani@law.njoag.gov

I echo this great feedback and wholeheartedly recommend Stephen's candidacy as a judicial law clerk.

Sincerely,

Shireen Farahani
Deputy Attorney General
New Jersey Division of Law

STEPHEN MAGERAS
548 Driggs Avenue #4
Brooklyn, NY 11211
(203) 979-0982
stephen.mageras@gmail.com

Writing Sample #1

The sample below is a memorandum I drafted last summer as an intern for the Affirmative Civil Rights and Labor Enforcement group at the New Jersey Attorney General's Office. It was prepared to inform a motion in a pending administrative proceeding. The central question addressed is whether New Jersey's worker classification statute is preempted by the FAAAA. Our adversary argued that the statute is preempted. They hoped to evade a state audit finding that they had been misclassifying their workers as independent contractors (rather than employees) for several years. If the finding stood, they would owe the state a significant amount in employee benefits contributions.

This sample has not been substantially edited by others. My supervisors at the Attorney General's Office reviewed it for redaction purposes and included some stylistic suggestions that I accepted.

To:	Shireen Farahani
From:	Stephen Mageras
Date:	August 3, 2022
Re:	XYZ Company v. New Jersey Department of Labor Preemption Claim

Memorandum

Question Presented

Does the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA") preempt the enactment and enforcement of N.J. Stat. Ann. § 43:21-19(i)(6) (the "NJ ABC test")?

Short Answer

The FAAAA does not preempt the NJ ABC test. The Third Circuit held in Bedoya v. Am. Eagle Express Inc., 914 F.3d 812 (3d Cir. 2019) that the NJ ABC test does not have a sufficiently direct or significant impact on motor carrier prices, routes, or services to be preempted by the FAAAA.

Background

XYZ Company ("XYZ") is an auto parts distributor that provides delivery services using independent drivers. XYZ advertises its services to clients as an alternative to maintaining in-house delivery fleets. XYZ operates and employs drivers in the state of New Jersey.

In a series of audits, the New Jersey Department of Labor ("NJ DOL") found that XYZ had misclassified its employees as independent contractors. XYZ contested this finding and requested a declaration in the Office of Administrative Law ("OAL") that the NJ ABC test, which determines workers' employment classification, is preempted by the FAAAA. The NJ ABC test is a provision of the New Jersey Unemployment Compensation Law ("UCL"). An Administrative Law Judge ("ALJ") will hear XYZ's complaint ("XYZ Compl.").

Under the NJ ABC test, a worker performing services for a company in exchange for compensation is considered an employee unless the employer can show that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C) (West).

Analysis

The FAAAA does not preempt the NJ ABC test because the test does not have a sufficiently direct and significant impact on motor carrier prices, routes, or services to overcome the presumption against preemption. This precise question was answered in Bedoya, and the circumstances of the present case are not distinguishable from those in Bedoya.

I. Interpretations of Federal Statutes by Federal Circuit Courts Are Not Binding on New Jersey State Courts, but Are Typically Followed to Preserve Judicial Uniformity

No New Jersey state court has decided whether the FAAAA preempts the NJ ABC test, but the Third Circuit in Bedoya answered this question directly, holding that it does not. The District of New Jersey followed Bedoya in Eagle Sys., Inc. v. Asaro-Angelo, No. CV1811445MASDEA, 2019 WL 3459088 (D.N.J. July 31, 2019) (addressing, like the present case, arguments from a trucking service company that the NJ ABC test is preempted by the FAAAA). Although it is true that lower federal court decisions interpreting federal statutes do not bind state courts, they are entitled to due respect as a matter of comity and in the interest of uniformity. E.g., State v. Witczak, 23 A.3d 416, 424–25 (N.J. Super. Ct. App. Div. 2011). Given the lack of New Jersey state court precedent addressing this question, Bedoya is the most relevant and persuasive authority available and should be followed by a New Jersey state court to preserve judicial uniformity. Other federal circuits have ruled on whether the FAAAA preempts certain

states' employment classification tests (ABC tests), but these decisions concerned state tests that differ from the NJ ABC test to varying degrees. See Cal. Trucking Ass'n v. Bonta, 996 F.3d 644 (9th Cir. 2021) (holding FAAAA did not preempt the California ABC test); Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir. 2016) (holding FAAAA did not preempt the Illinois ABC test); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016) (holding FAAAA preempted the Massachusetts ABC test).

Bedoya's strong precedential value is not altered if a putative employer brings a preemption challenge in the OAL. ALJs refer to the OAL as a lower state court and adopt the same stance as New Jersey state courts on the precedential weight of federal decisions. See, e.g., Our Lady of Lourdes Med. Ctr. v. Div. of Med. Assistance & Health Servs., OAL Docket No. HMA 09193-05 (Dec. 10, 2006), https://njlaw.rutgers.edu/collections/oal/html/initial/hma09193-05_1.html (explaining that the OAL is bound by state appellate opinions because the OAL is a lower state court); see also Cebula v. Catalina Mktg. Corp., OAL Docket No. CRT 05588-02, at 13 n.7 (Oct. 24, 2003), https://njlaw.rutgers.edu/collections/oal/final/crt05588-02.pdf (explaining that while New Jersey courts are not bound by federal precedent, they consistently look to federal decisions as a source of interpretive authority).

II. FAAAA Preemption Is Appropriate Where a State Law Has a Sufficiently Direct and Significant Impact on Carrier Prices, Routes, or Services

"[P]reemption doctrine stems from the Supremacy Clause, which provides that 'the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" Bedoya, 914 F.3d at 817 (quoting U.S. Const. art. VI, cl. 2). "There are three categories of preemption: field preemption, conflict preemption, and express preemption." Id. XYZ alleges that the NJ ABC test is expressly preempted by the FAAAA. (XYZ Compl.) Express preemption requires determining whether "[s]tate action may be

foreclosed by express language in a congressional enactment." Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 131 (3d Cir. 2018) (alteration in original) (citation omitted).

"Preemption analysis begins with the presumption that Congress does not intend to supplant state law" in areas of traditional state police power (a "presumption against preemption"). Dilts v. Penske Logistics, LLC, 769 F.3d 637, 642–43 (9th Cir. 2014); see also Bedoya, 914 F.3d at 817; Lupian, 905 F.3d at 131–32. The employment regulations affected by the NJ ABC test seek to protect workers, so both the test and its dependent regulations fall in the category of traditional police power. See Bedoya, 914 F.3d at 818. The presumption against preemption is rebutted where Congress has a "clear and manifest purpose" to preempt state laws. E.g., id. To determine whether Congress had such a purpose, courts look to the plain language of the statute, the statutory framework as a whole, and any separate evidence of Congress' purpose in enacting the statute or similar statutes. Id.

Congress passed the FAAAA in 1994, seeking to deregulate both the air and motor carrier industries. See id. To this end, the FAAAA includes a preemption provision, which provides that: "a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Given the breadth of the words "related to," the United States Supreme Court has provided additional guidance on when a state law can be considered related to carrier prices, routes, or services and thus preempted. See Nw., Inc. v. Ginsberg, 572 U.S. 273, 280–81 (2014) (addressing similar preemption language in the Airline Deregulation Act of 1978 ("the ADA")); Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 260–61 (2013); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 370–71 (2008); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385–86, 390 (1992) (addressing the ADA).

Drawing on these cases, XYZ asserts that a state law is preempted if it "has a connection with, or reference to" a motor carrier's prices, routes, or services. XYZ Brief ("XYZ Br."). But, this argument ignores the bounds the Court has carefully set on the scope of preemption under this statutory language. The Court has observed that "the breadth of the words 'related to' does not mean the sky is the limit," Dan's City, 569 U.S. at 260, and to read the phrase "'related to' with 'uncritical literalism' would render preemption an endless exercise." Bedoya, 914 F.3d at 819 (citing Dan's City, 569 U.S. at 260–61). After all, "everything 'relates to' everything else in some manner." Schwann, 813 F.3d at 436 (citing N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)). As a result, the Court has cautioned that a law is not preempted if it affects carrier prices, routes, or services "in only a 'tenuous, remote, or peripheral . . . manner.'" Dan's City, 569 U.S. at 261 (quoting Rowe, 552 U.S. at 371). In addition, "preemption occurs where a state law has 'a significant impact on carrier rates, routes, or services.'" Bedoya, 914 F.3d at 819–20 (quoting Rowe, 552 U.S. at 375).

Federal circuit courts have built upon the principles articulated by the United States Supreme Court and further clarified the factors to be considered when assessing FAAAA preemption. Bedoya synthesizes this case law, explaining the considerations that have been found relevant to whether a state law has a sufficiently "direct" and "significant" effect to be preempted by the FAAAA. See id. at 820–23.

III. The NJ ABC Test Is Not Preempted by the FAAAA Under a Directness and Significance Analysis

A. Directness

To assess the directness of a law's effect on prices, routes, or services, courts should examine whether the law "(1) mentions a carrier's prices, routes, or services; (2) specifically

targets carriers as opposed to all businesses; and (3) addresses the carrier-customer relationship rather than non-customer-carrier relationships (e.g., carrier-employee)." Id. at 823.

The NJ ABC test does not have a sufficiently direct impact on motor carrier prices, routes, or services to be preempted by the FAAAA. If there is an effect, it is too "tenuous, remote, or peripheral" to warrant preemption. Dan's City, 569 U.S. at 261. First, the NJ ABC test makes no mention of motor carrier prices, routes, or services. Bedoya, 914 F.3d at 824. Nor does it specifically target carriers—the language of the statute addresses all businesses in the state of New Jersey. Id. Lastly, the NJ ABC test regulates at the level of the carrier-worker relationship, not the carrier-customer relationship. Id. State laws impacting the carrier-customer relationship are more likely to be preempted, see id. at 821–22, but laws that govern "how an employer pays its workers do not 'directly regulate[] how [a carrier's] service is performed[;]' they merely dictate how a carrier 'behaves as an employer[.]'" Id. at 824 (alterations in original) (quoting DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 88 (1st Cir. 2011)). As a result, the NJ ABC test is "'steps removed' from regulating customer-carrier interactions through prices, routes, or services." Id. (quoting Costello, 810 F.3d at 1054).

B. Significance

To assess whether a law has a significant effect on a carrier's prices, routes, or services, courts should consider whether:

> (1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier is permitted to transport; and (4) the law existed in one of the jurisdictions Congress determined lacked laws that regulate intrastate prices, routes, or services and thus, by implication, is a law Congress found not to interfere with the FAAAA's deregulatory goal. . . . [A] state law [may] ha[ve] a significant effect where the law undermines Congress' goal of having competitive market forces dictate prices, routes, or services of motor carriers.

Id. at 823.

The NJ ABC test also does not have a significant effect on motor carrier prices, routes, or services. The test "does not bind [carriers] to a particular method of providing services." Id.; see also Eagle Sys., 2019 WL 3459088, at *6–7. XYZ disputes this, arguing that the NJ ABC test requires them to use employees rather than independent contractors. (XYZ Compl.) XYZ seeks to draw parallels to Schwann, where the First Circuit ruled on anti-competition grounds that the Massachusetts ABC test was preempted by the FAAAA because it, in effect, "barr[ed] FedEx from using any individuals as full-fledged independent contractors." (XYZ Br.) (quoting Schwann, 813 F.3d at 437). The Third Circuit, however, explicitly distinguished the NJ ABC test from the Massachusetts ABC test. Bedoya, 914 F.3d at 824. While the two tests are largely the same, the NJ ABC test includes an alternative method for reaching independent contractor status if the putative employer can show that the worker provides services outside of the employer's places of business. N.J. Stat. Ann. § 43:21-19(i)(6)(B). In contrast with Schwann, "[n]o part of the New Jersey test categorically prevents carriers from using independent contractors. . . . [T]he state law . . . does not mandate a particular course of action." Bedoya, 914 F.3d at 824–25. This distinguishing feature of the NJ ABC test ensures that carriers have various avenues to comply with New Jersey employment laws. Id. at 825.

Even if a judge disagrees with Bedoya and Eagle Sys. and finds that the NJ ABC test does not give carriers a meaningful degree of increased flexibility compared to the Massachusetts ABC test considered in Schwann, it does not necessarily follow that Schwann is controlling and the NJ ABC test should be preempted. In Bonta, the Ninth Circuit reviewed a California ABC test that was effectively identical to the ABC test considered in Schwann and held that the connection between the California ABC test and carrier prices, routes, and services was too tenuous to warrant preemption under the FAAAA. See Bonta, 996 F.3d at 660. The Ninth Circuit emphasized that

even though the California ABC test "affects the way motor carriers must classify their workers, and therefore compels a particular result at the level of a motor carrier's relationship with its workforce[,]" id. at 659, this is permissible as long as it does not "effectively bind[] motor carriers to specific prices, routes, or services at the consumer level." Id. at 660–61. The differing opinions Schwann and Bonta express on this point constitute a circuit split, and XYZ has not justified why the First Circuit should be followed over the Ninth Circuit.

XYZ further alleges that being forced to establish and maintain an employee workforce will increase their costs (and in turn, their prices), and may require alteration of their driver's routes. See (XYZ Compl.) These alleged secondary effects are partially moot because, as discussed, the Bedoya court found that the NJ ABC test does not require that carriers use employees. However, it is possible that under the test, XYZ will be encouraged to "shift its model away from using independent contractors." Bedoya, 914 F.3d at 825. This type of impact is not significant enough to warrant FAAAA preemption because "[n]early every form of state regulation carries some cost." Dilts, 769 F.3d at 646. "Generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the[ir] [prices, routes, or services]." Id. In deregulating motor carriers, "Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability." Id. at 646–47 (citing 49 U.S.C. § 14501(c)).

Furthermore, XYZ has yet to present evidence demonstrating that the NJ ABC test will have the effects on their business that they allege. While XYZ does not need to produce "empirical evidence to support its assertions of significant impact at the pleading stage," Bedoya, 914 F.3d at 825 (citing Costello, 810 F.3d at 1055), there does need to be a "logical connection between the application of New Jersey's ABC classification test and the list of new costs [a company] would

purportedly incur." Id. Among XYZ's parade of horrors, it is particularly difficult to discern the logical connection between the NJ ABC test and XYZ being "driven out of business." (XYZ Compl.) Federal circuit courts have often rejected "lists of conclusory impacts" as sufficient evidence of significant impact on carrier prices, routes, or services for the purpose of preemption analysis. Bedoya, 914 F.3d at 825 (citing Lupian, 905 F.3d at 135–36 (finding that defendant's evidence of the negative financial impact they would incur if an Illinois wage law was not preempted did not equate to significant impact on Congress' deregulatory objectives); and Costello, 810 F.3d at 1056 (rejecting defendant's contention that increased labor costs as a result of the Illinois ABC test amounted to evidence of significant impact on the prices defendant offered to their customers)).

The NJ ABC test does not create a "'patchwork' of unique state legislation[,]" Bedoya, 914 F.3d at 826 (citation omitted), because New Jersey's test is "similar to that used in many other states." Bedoya, 914 F.3d at 826 (citing Chambers v. RDI Logistics, Inc., 65 N.E.3d 1, 11–12 (Mass. 2016)). Nor does the NJ ABC test significantly undermine Congress' goal of having "competitive market forces dictate prices, routes, or services of motor carriers." Id. at 823. XYZ alleges that the NJ ABC test "as applied to small motor carriers impermissibly interfere[s] with natural market forces and competition." (XYZ Compl.) However, the text of the NJ ABC test is indifferent to whether a motor carrier is "large" or "small." See N.J. Stat. Ann. § 43:21-19(i)(6). In isolation, it cannot have the effect of "encourag[ing] motor carriers to change business models" because of their relative size. (XYZ Compl.) Finally, the NJ ABC test is not "the kind of preexisting state regulation[] with which Congress was concerned when it passed the FAAAA." Bedoya, 914 F.3d at 826. The legislative history demonstrates this: "[E]ight of the ten jurisdictions that Congress identified as not regulating intrastate prices, routes, and services [when passing the

FAAAA] 'had laws for differentiating between an employee and an independent contractor,' . . . and at least three codified ABC tests similar to that of New Jersey." Id. (citations omitted).

C. This Case Is Not Distinguishable from Federal Circuit Decisions

XYZ may try to distinguish the facts here from those in federal circuit decisions that have found no FAAAA preemption. For instance, XYZ may argue that this case is distinguishable from Bedoya because Bedoya concerned private individuals alleging that their employer misclassified them as independent contractors, whereas this case involves the state enforcing its employment laws in a way that XYZ alleges prevents them from classifying any of their workers as independent contractors. The District Court of New Jersey found this argument unpersuasive in Eagle Sys., holding that the putative employer's "attempts to distinguish the instant matter from the facts and procedural posture of Bedoya are not supported by any authority suggesting that those differences require a different result . . . ." Eagle Sys., 2019 WL 3459088, at *6.

XYZ has previously argued that this case is distinguishable from Costello because unlike the Illinois wage law at issue in Costello, the New Jersey UCL contains no provision "allow[ing] motor carriers to 'contract around' the Statute's requirements." (XYZ Br.) (quoting Costello, 810 F.3d at 1057). However, the Bedoya court explicitly rejected the idea that a contractual workaround is necessary to avoid preemption. Bedoya, 914 F.3d at 824–25 n.8. "[W]hile a contractual circumvention option may provide another route for compliance, weighing against FAAAA preemption, it is not the only way a state statute can afford carriers some flexibility. Here, the New Jersey ABC classification test gives carriers options . . . ." Id.

Conclusion

For the reasons stated herein, the NJ ABC test is not preempted by the FAAAA.

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Writing Sample #2

The sample below is a memorandum I drafted last summer as a research assistant for Professor Farhang Heydari, the Legal Director of the New York University Policing Project. I was asked to explain the origins of the First Amendment "right to gather information" and whether this right allows individuals to photograph others in public spaces. This question was triggered by conversations Professor Heydari had with private companies that are installing automatic license plate readers around the country and selling the data they collect to law enforcement. When asked whether their activities might infringe on privacy rights, the companies responded that they had a First Amendment right to gather this type of data in public spaces. Selling license plate data to law enforcement may also raise Fourth Amendment questions, but for this memorandum, Professor Heydari asked me to focus on the boundaries of a private right to gather information.

This sample is entirely my own work. It has not been edited by others.

Stephen Mageras

Professor Farhang Heydari

July 20, 2022

Memorandum

Question Presented

Where does the First Amendment right to gather information come from and how has this right been applied? Does a general right to photograph in public spaces flow from this right to gather information?

Analysis

I. Origins of the Right to Gather Information

The First Amendment states that Congress "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. In the most literal sense, the First Amendment protects "the freedom to speak and the freedom to publish using a printing press." Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 250 (2004). However, the Supreme Court considers the purpose of the First Amendment, in particular the Speech Clause, to be much broader than this. *See id.* at 258. The Court has construed the Speech Clause to protect "most forms of human conduct engaged in for the purpose of expressing or communicating information or ideas." *Id.* Beyond speaking and other verbal forms, this includes representing things visually, acts that are necessarily or integrally tied to acts of expression, and acts that are engaged in with the intent to communicate a message. *Id.* at 258–59. Because information gathering can be integrally tied to expression, or engaged in with the intent to communicate a

message, it necessarily must be afforded some degree of First Amendment protection under Supreme Court precedents. *See id.* at 259–262.

The Court began to explicitly recognize that information gathering warrants First Amendment protection in the seminal cases *Zemel v. Rusk*, 381 U.S. 1 (1965), and *Branzburg v. Hayes*, 408 U.S. 665 (1972). The question in *Zemel* was whether it was constitutionally permissible for the Secretary of State to deny passport validation to a United States citizen who sought to travel to Cuba. 381 U.S. at 3. The appellant alleged that a ban on travel to Cuba was "direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies . . . and with conditions abroad which might affect such policies." *Id.* at 16. The Court acknowledged that the travel ban "renders less than wholly free the flow of information concerning that country[,]" but rejected the contention that a First Amendment right was involved. *Id.* The Court was wary of setting such a precedent given that nearly all government restrictions on action impede the wholly free flow of information in one way or another. *See id.* at 16–17. In their first mention of a "right to gather information," the Court asserted that "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.* at 17 (emphasis added).

In *Branzburg*, a news reporter claimed a First Amendment privilege in refusing to testify before a grand jury about his confidential sources. 408 U.S. at 667–79. The reporter argued that without an implied testimonial privilege, the freedom of the press to collect and disseminate news would be undermined. *Id.* at 698. The Court ultimately rejected this claim, but in doing so made the following observation:

> The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information . . . . We do not question the significance of free speech, press, or assembly

> to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; *without some protection for seeking out the news, freedom of the press could be eviscerated*.

Id. at 681 (emphasis added). This constituted the Court's first acknowledgement of a First Amendment right to gather news. Importantly, the Court went on to recognize that freedom of the press is not confined to news reporters and major newspapers, but rather "a 'fundamental personal right' which . . . 'necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* at 704 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938)).

It is not immediately clear how these two opinions interact and what the boundaries are for the information gathering rights they discuss. News-gathering is clearly entitled to some First Amendment protection under *Branzburg*, but in *Zemel*, information gathering by members of the general public apparently does not merit First Amendment consideration. McDonald, 65 Ohio St. L.J. 249, 303. One way to make sense of these opinions is to interpret *Zemel* as showing that even if a person intends to eventually communicate their findings to others, such a "generalized speech presumption" is not a sufficient basis for recognizing a First Amendment claim, *id.* at 331, while *Branzburg* shows that a right to gather information under the First Amendment should be limited to contexts where "the public dissemination of that information can be assured," *id.* at 331–32. In other words, limitations on speech are warranted where the vehicle for speech (e.g., a single citizen's trip to Cuba) does not sufficiently lend itself to the service of a public interest. This interpretation steers clear of authorizing limitations based on the speaker or the subject matter. This is important because granting protection to the gathering of information about "news," but not the conditions in Cuba, would be at odds with the general rule of First Amendment law that

the government cannot restrict speech on the basis of content or subject matter. *Id.* at 329–30. As McDonald writes, the *Zemel-Branzburg* decisions:

> [M]ay suggest . . . that the recognition of a right to gather information [is] only . . . appropriate in situations where the societal, versus the individualistic, purposes of the First Amendment are being served in an identifiable way. . . . [S]uch protection might be reserved to those channels of communication, like the organized press, that society relies upon for the dissemination of important information to the public.

Id. at 332.

Lower courts have taken this framework for understanding *Zemel* and *Branzburg* and stretched it to accommodate new situations over time. Because *Branzburg* "based what protection it did accord to newsgathering on 'freedom of the press' principles, it seems to have created a general perception . . . that the acquisition of 'news' . . . is the only (or at least the main) type of information-gathering activity that merits constitutional protection." *Id.* at 303. There is now a substantial and highly publicized body of case law addressing what has come to be known as a "right to record" or "right to film" police officers and other government officials. *See, e.g.*, *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) (holding that a journalist had a First Amendment right to film police performing their duties in public); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (holding that a Massachusetts statute prohibiting secret recording of police officers discharging their official duties in public spaces violated the First Amendment); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (holding that police officers are not entitled to qualified immunity for arresting someone who filmed them as they arrested another individual). This right to record is derived from the principle that "gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Rollins*, 982 F.3d at 832 (quoting *Glik*, 655 F.3d at 82).

These decisions show how the concept of a right to gather news or information has been broadened far beyond the original context of *Branzburg*. The right to record police in public is available to normal citizens and not limited to news reporters or other members of the press. The public's right of access to information has been held to be "coextensive with that of the press[,] [in part because] changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw." *Glik*, 655 F.3d at 83–84.

Even more relevant to this memorandum are decisions that have asserted a right to gather information in circumstances that do not involve the actions of government officials. For example, the Eighth Circuit held that a private citizen recording children in a public park was protected speech because it was related to an expressive purpose. *See Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021). The Ninth Circuit found that animal rights activists entering a private agricultural facility without consent and recording its operations was protected speech because it concerned a matter of public interest. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). And the Tenth Circuit held that the collection of resource data from public lands was protected speech because it furthered public debate and the free discussion of governmental affairs. *See W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). These decisions all emphasize the protection of speech that serves a public interest or furthers public discussion. The decisions involving police, by contrast, also take into consideration the separate concern of preventing abuses by law enforcement officials. *See, e.g.*, *Glik*, 655 F.3d at 82–83.

II. General Right to Photograph in Public Spaces

Some private companies now argue that they possess a First Amendment right to gather photographs of people and their property (information) if this information is obtained in a public space or is otherwise publicly available. *See* Cyrus Farivar, *Private firms argue First Amendment*

right to collect license plate data, Ars Technica (Feb. 14, 2014), https://arstechnica.com/tech-policy/2014/02/private-firms-argue-first-amendment-right-to-collect-license-plate-data/ (discussing private firms' argument that they have a right to collect license plate data displayed in public); Vera Eidelman, *Clearview's Dangerous Misreading of the First Amendment Could Spell the End of Privacy Laws*, ACLU (Jan. 7, 2021), https://www.aclu.org/news/privacy-technology/clearviews-dangerous-misreading-of-the-first-amendment-could-spell-the-end-of-privacy-laws (discussing Clearview's argument that it has a right to capture faceprints through publicly available social media posts). Is there merit to these claims?

Though the right to gather information under the First Amendment has been expanded over time, there does not appear to be case law supporting the idea that any photography or recording in public spaces is protected speech. Courts continue to demand that a clear expressive purpose exists before holding that video recording or photographic information gathering constitutes protected speech. *See, e.g.*, *Ness*, 11 F.4th at 923; *see also Porat v. Lincoln Towers Cmty. Ass'n*, No. 04 CIV. 3199 (LAP), 2005 WL 646093, at *4–5 (S.D.N.Y. Mar. 21, 2005) (finding that plaintiff's recreational photography of a residential building was not protected by the First Amendment because it lacked a message to be communicated and an audience to receive that message). With this in mind, perhaps a private company could claim a First Amendment right to collect license plate data by arguing that their purpose in doing so is to further public discussion on, for example, the reduction of crime. However, this position is difficult to defend when the more obvious purpose is to sell the data to law enforcement. Even more blatantly mercantile is the practice of selling such data to private investigators or repossession companies. *See* Joseph Cox, *This Company Built a Private Surveillance Network. We Tracked Someone with It*, VICE (Sept.